

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 71-827, 71-830

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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- (a) CAB Opinion and Order No. 3210, October 17, 1944 (officially reported at 6 C.A.B. 153) [not a part of the Record herein] A-3297
- (b) CAB Order No. 4437, January 26, 1946 A-3307
- (c) CAB Order No. E-922, October 29, 1947 A-3309
- (d) CAB Opinion and Order No. E-1735, June 30, 1948 (officially reported at 9 C.A.B. 381) [not a part of the Record herein] A-3311
- (e) CAB Opinion and Order No. E-4701, October 6, 1950 (officially reported at 12 C.A.B. 192) [not a part of the Record herein] A-3333
- (f) CAB Opinion and Order No. E-16195, December 29, 1960 (officially reported at 32 C.A.B. 1363) A-3403

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In the District Court, June 1961-January 1963

<u>Date</u>	<u>Proceedings</u>
June 30, 1961	Filed complaint and issued summons.
June 30, 1961	Filed order directing that issuance of process, complaint and all other papers filed herein be kept under seal, etc.—MacMahon, J.
July 5, 1961	Filed affidavit and show cause order—leave to plaintiff to take deposition of Howard R. Hughes—returnable July 5, 1961. Marshal's return annexed—Served E. W. Hoeppner, Sales Manager Hughes Tool Co., July 5, 1961.
July 5, 1961	Filed plaintiff's memorandum of points and authorities in support of motion pursuant to Rule 26(a) FRCP.
July 31, 1961	Filed affidavit of Chester C. Davis in support of application of Toolco for adjournment of plaintiff's motion (exhibits).
August 2, 1961	Filed plaintiff's notice to take deposition of Howard R. Hughes.
August 3, 1961	Filed plaintiff's notice to take deposition of Hughes Tool Co., etc.
August 3, 1961	Filed defendant Hughes Tool Co.'s notice to take depositions of James F. Oates, Jr. and Grant Keehn.
August 3, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Harry C. Hagerty and Gordon P. Jenkins.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
August 3, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Ben-Fleming Sessel and Robert A. Kerr.
August 9, 1961	Memo endorsed on notice of motion filed July 5, 1961—Motion Denied. This is an Order. No Settlement is necessary.—Murphy, J.
August 9, 1961	Filed affidavits, exhibits, complaint and notice of motion for an order dismissing complaint, etc.—returnable August 29, 1961.
August 9, 1961	Filed defendant Hughes Tool Co.'s memorandum in support of motion to dismiss complaint.
August 14, 1961	Filed plaintiff's proposed schedule for taking of depositions.
August 14, 1961	Filed Opinion #27139 granting defendant's motion for priority of taking depositions by Hughes Tool Co.—Herlands, J.—mailed notices of entry August 14, 1961.
August 14, 1961	Filed affidavit of Chester C. Davis under Rule 9(f).
August 17, 1961	Filed affidavit, exhibits and notice of motion for an order directing defendant Hughes Tool Co. to produce—returnable August 22, 1961.
August 17, 1961	Filed plaintiff's Points and authorities in support of its motion to produce.
August 18, 1961	Filed plaintiff's notice to take deposition of Howard R. Hughes.

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<u>Date</u>	<u>Proceedings</u>
August 18, 1961	Filed plaintiff's amended notice re: depositions in compliance with decision of Herlands, J. August 14, 1961, etc.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Bankers Trust Co.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Prudential Insurance Co.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Irving S. Olds.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Ernest R. Breech.
August 22, 1961	Filed defendant Hughes Tool Co.'s notice to take deposition of Morgan Guaranty Trust Co.
August 22, 1961	Filed Supplemental notice of taking deposition of Warner Mendel by defendant Hughes Tool Co.
August 23, 1961	Filed affidavit, exhibits and notice of motion to assign this case to a judge for all purposes, etc.—Returnable August 21, 1961 in Chambers before Ryan, J.
August 23, 1961	Memorandum endorsed on notice of motion filed August 23, 1961 adjourning hearing thereon to August 29, 1961 at 11 A.M. or the further order of the Court—Ryan, J.

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<u>Date</u>	<u>Proceedings</u>
August 23, 1961	Filed affidavit, exhibit and order adjourning motion of Hughes Tool Co. for dismissal and summary judgment to September 5, 1961 to be heard thereafter on a date to be set by further order of this Court, adjourning depositions, and staying proceedings until August 29, 1961—Ryan, J.
August 24, 1961	Filed copy of above order of August 23, 1961 with admission of service.
August 31, 1961	Filed order referring action to Metzner, J. for all purposes—Ryan, J.
September 1, 1961	Filed plaintiff's notice of true copy of order of Ryan, Ch. J., August 31, 1961.
September 5, 1961	Memorandum endorsed on notice of motion filed August 9, 1961 referring motion to Judge Metzner—Cashin, J.
September 5, 1961	Memorandum endorsed on notice of motion filed August 17, 1961 referring motion to Judge Metzner—Cashin, J.
September 8, 1961	Filed pre-trial order on discovery, depositions and motions for summary judgment—Metzner, J.
October 2, 1961	Before Metzner, J.—Pre-trial conference held.
October 17, 1961	Filed transcript of record of proceedings of September 6, 1961.

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<u>Date</u>	<u>Proceedings</u>
November 2, 1961	Filed transcript of stenographer's minutes of proceedings of October 2, 1961.
December 5, 1961	Filed Opinion #27343 granting motion for production and inspection as indicated herein—Settle order—Metzner, J.
January 12, 1962	Filed affidavit of service by Frank O'Connell on defendant Raymond M. Holliday January 10, 1962.
January 24, 1962	Filed Volume #1 of deposition of Charles C. Tillinghast, Jr.
January 24, 1962	Filed Volume #2 of deposition of Charles C. Tillinghast, Jr.
January 24, 1962	Filed one envelope containing Exhibits to Charles C. Tillinghast, Jr. deposition.
January 25, 1962	Filed plaintiff's notice of taking deposition of Howard R. Hughes, etc.
February 8, 1962	Filed Pre-Trial order narrowing and formulating issues and appointing J. Lee Rankin as Special Master, 36 West 44th Street, New York City, to act in connection with depositions and other discovery proceedings, etc.—Metzner, J. mailed notice.
February 14, 1962	Filed affidavit, exhibits and order bringing in additional parties as defendants and amending title of action as indicated herein. Issued summons on counterclaim—Metzner, J.

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<u>Date</u>	<u>Proceedings</u>
February 14, 1962	Filed Answer to complaint and its counterclaims herein of defendant Hughes Tool Co.
February 19, 1962	Filed Opinion #27581. The motion is denied. So ordered. Metzner, J. mailed notice.
February 21, 1962	Filed affidavit and notice of motion for ruling pursuant to Rule 26, deposition of plaintiff be concluded prior to commencement, etc. before the Special Master.
February 26, 1962	Filed Notice of Motion for order revising the schedule of depositions, etc.—Returnable before Judge Metzner, February 23, 1962 at 11:00 A.M. (also for judgment dismissing the counterclaims).
February 26, 1962	Filed Notice of Motion for order granting Dillon, Read & Co. an additional defendant on counterclaims extension of time, to reply to counterclaims etc.—Returnable before Judge Metzner, February 23, 1962 at 11:00.
February 26, 1962	Filed notice of taking deposition of defendant Hughes Tool Co. by H. R. Hughes on February 8, 1962.
February 26, 1962	Filed notice of motion for order revising the schedule of depositions and for judgment dismissing counterclaims, etc. returnable/forthwith Before Judge Metzner.
February 28, 1962	Filed transcript of record of proceedings on February 23, 1962.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
March 1, 1962	Filed affidavits, exhibits and notice of motion before Special Master on March 2, 1962 for a ruling that defendant Hughes Tool Co. is entitled to protective relief re: production of financial statement.
March 5, 1962	Memo endorsed on notice filed February 26, 1962. Motion disposed of by pre-trial order of this date. Metzner, J. (Dillon, Read).
March 5, 1962	Memo endorsed on motion filed February 26, 1962. Motion disposed of by pre-trial order of this date. Metzner, J. (Equitable, Metropolitan, Oates and Hagerty).
March 6, 1962	Filed Pre-Trial order setting dates for further hearings, etc. Metzner, J.
March 6, 1962	Memo endorsed on motion filed February 26, 1962. Motion disposed of by pre-trial order of this date. Metzner, J. (Irving Trust and Sessel).
March 22, 1962	Filed affidavit and order of Special Master J. Lee Rankin binding parties by provisions herein (see order).
March 26, 1962	Filed Answer to complaint by defendant Raymond M. Holliday.
April 4, 1962	Filed affidavit and notice of motion before the Special Master returnable April 6, 1962, to declare certain documents privileged or not called for, etc.

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
April 16, 1962	Filed defendant Hughes Tool Co.'s Memorandum in opposition to motion of plaintiff to strike or dismiss counterclaims one through five and to dismiss or for summary judgment as to counterclaim six.
April 18, 1962	Before Metzner, J., hearing held on motion to strike.
May 3, 1962	Filed transcript of proceedings of April 18, 1962.
May 4, 1962	Filed plaintiff's Trans World Airlines Inc.'s interrogatories to defendant Hughes Tool Co.
May 4, 1962	Filed plaintiff's Trans World Airlines Inc.'s interrogatories to defendant Raymond M. Holliday.
May 10, 1962	Filed pre-trial order. Metzner, J.
May 11, 1962	Filed Oath of Special Master, J. Lee Rankin.
May 11, 1962	Filed affidavit and notice of motion for review of opinion of Special Master returnable before Judge Metzner.
May 11, 1962	Filed defendant's memorandum of law in support of Hughes Tool Co. application for review of Special Master's ruling of the attorney-client privilege.
May 17, 1962	Hearing held on motion in opposition to application of defendant Hughes Tool Co. for review of a decision of the Special Master. Decision reserved. Metzner, J.

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<u>Date</u>	<u>Proceedings</u>
June 8, 1962	Filed affidavit and notice of motion before Metzner, J. at time and place to be fixed by him for review and reversal of so much of order of Special Master, rendered June 4, 1962, as overrules Hughes Tool Co.'s objections to interrogatories, etc.
June 12, 1962	Filed transcript of record of proceedings for May 17, 1962.
June 12, 1962	Filed transcript of record of proceedings for May 7, 1962.
July 11, 1962	Filed Memorandum of Hughes Tool Co. supporting application for review.
July 12, 1962	Filed Memorandum of defendant Hughes Tool Co. in opposition to application of Trans World Airlines Inc. for reversal of ruling of Special Master re applicability of Rule 4 to this action.
July 12, 1962	Filed pre-trial order modifying ruling of Special Master re interrogatories on defendant Hughes Tool Co. appeal (modified as indicated and as modified is sustained). (see order) So ordered. Metzner J. Mailed notice.
July 12, 1962	Memo endorsed on motion filed June 8, 1962 — Disposed of in accordance with pre-trial order dated today. Metzner, J. Mailed notice.

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<u>Date</u>	<u>Proceedings</u>
July 12, 1962	Hearing held before Metzner, J. (Held on motion for review and reversal of Special Master order overruling Toolco objections to interrogatories.)—Decision reserved.
July 19, 1962	Filed Notice of Motion for an order clarifying and modifying pre-trial order as stated, affidavit of mailing attached.
July 23, 1962	Memo endorsed on Application for clarification of order of July 12, 1962 — Application denied. So ordered. Metzner, J. Mailed notice.
July 24, 1962	Memo endorsed on Motion filed May 11, 1962; Court sustains ruling of Special Master. If there are any specific documents concerning which the defendant desires specific rulings as to admissibility they may be submitted to Special Master pursuant to directions appearing on p. 4391 of transcript and in letter of May 2, 1962 as modified by letter of May 3, 1962. So ordered. Metzner, J. Mailed notice.
July 26, 1962	Filed affidavit in support of application of Hughes Tool Co. for an order enlarging time in which to answer to interrogatories.
July 26, 1962	Memo endorsed on affidavit filed July 26, 1962—Motion granted to extent that time of defendant to answer plaintiff's interrogatories to August 27, 1962. So ordered. Metzner, J. Mailed notice.

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
July 27, 1962	Filed plaintiff's Memorandum reviewing the history of TWA's application for permission to propound interrogatories to Hughes Tool Co. concerning location of Howard R. Hughes.
August 1, 1962	Filed transcript of Stenographer's Minutes of proceedings of July 12, 1962.
August 21, 1962	Filed notice of taking deposition of Howard R. Hughes.
August 24, 1962	Filed authorization to accept service for Howard R. Hughes to Mr. Chester C. Davis.
August 29, 1962	Filed plaintiff's affidavit and notice of motion for answers to certain interrogatories returnable September 6, 1962. Before Metzner, J. Rm. 1105 at 11:30.
September 5, 1962	Filed affidavit of Chester C. Davis, in opposition to plaintiff's Rule 37 motion.
September 6, 1962	Filed transcript of record of proceedings for July 26, 1962.
September 6, 1962	Before: Metzner, J.—Hearing held on plaintiff's motion for answers to interrogatories. Decision reserved.
September 7, 1962	Filed affidavit of John F. Sonnett, in reply to affidavit of Chester C. Davis.
September 13, 1962	Filed affidavits, exhibits and affidavit of Chester C. Davis, in rebuttal to affidavit of John F. Sonnett.

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
September 17, 1962	Filed affidavit, exhibits of John F. Sonnett, in reply to portions of affidavit of Chester C. Davis of September 13, 1962, etc.
September 18, 1962	Filed plaintiff's notice of hearing [sic] from Special Master's ruling, as directed to TWA's appeal from so much of ruling of September 15, 1962, at 10:30 A.M. on September 19, 1962 in Room 906.
September 19, 1962	Filed notice of defendant Hughes Tool Co. of application of review and to reverse oral order of Special Master of September 15, 1962.
September 20, 1962	Filed defendant Hughes Tool Co.'s notice of application for review.
September 24, 1962	Filed Pre-Trial Order re: deposition of Howard R. Hughes. Metzner, J.
September 26, 1962	Filed affidavit and notice of motion for an order directing Special Master to conduct pre-trial hearings, returnable before Metzner, J. September 28, 1962, at 10:00 A.M. in chambers.
October 11, 1962	Filed show cause order to dismiss the counterclaims of Hughes Tool Co. and staying proceedings as to defendant Breech, etc. Metzner, J. returnable October 15, 1962, at 11:00 A.M.
October 24, 1962	Filed transcript of record of proceedings for September 19, 1962.
November 2, 1962	Filed plaintiff's notice of taking deposition.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
November 8, 1962	Filed memorandum of Hughes Tool Co. in support of the rulings of the Special Master rendered October 25, 1962.
November 14, 1962	Filed further interrogatories by defendant Hughes Tool Co. to plaintiff.
December 21, 1962	Filed affidavit and notice of motion for review of order of Special Master, etc. returnable before Judge Metzner, time and place to be fixed.
January 3, 1963	Filed defendant Toolco's Notice of Motion for review of order of Special Master entered December 28, 1962 denying application for a direction as indicated and request for Court to fix schedule for filing papers in support or opposition to this motion.
January 3, 1963	Filed defendant Toolco's Notice of Motion re: order of Special Master entered December 28, 1962.
January 8, 1963	Filed application of plaintiff for leave to withdraw notice of appeal from order of Special Master.
January 8, 1963	Filed affidavit in support of application of Toolco to take deposition.
January 8, 1963	Filed affidavit in support of application of Toolco for review of order of Special Master rendered December 28, 1962.
January 10, 1963	Filed Order disposing of Ruling of Special Master. So ordered. Metzner, J. Mailed notice January 11, 1963.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
January 18, 1963	Filed affidavit and Notice of Motion for order that deposition of Howard R. Hughes may be taken as indicated, etc.
January 18, 1963	Filed Opinion No. 28550. Unless counsel for defendant indicates by noon January 22, 1963 a desire to change designated place, deposition shall proceed in U. S. Courthouse in Los Angeles. So ordered. Metzner, J. Mailed notice of entry—January 21, 1963.
January 22, 1963	Filed Notice of Motion for order that deposition of Howard R. Hughes shall not be taken in this action until after final adjudication of aforesaid motion to dismiss, etc. Returnable February 8, 1963.
January 22, 1963	Filed Stipulation and Order extending time for production of documents to January 23, 1963. Metzner, J.
January 22, 1963	Filed Notice of Appeal—Mailed copies January 23, 1963 to Cahill, Gordon, Reindel & Ohl; Cravath Swaine & Moore; Winthrop Stimson Putnam & Roberts; Dunnington, Bartholow & Miller; Chadbourne Parke Whiteside & Wolff; and J. Lee Rankin.

In the Court of Appeals, January-March 1963

January 22, 1963	Filed preliminary record (certified copy of notice of appeal).
January 22, 1963	Filed motion for stay.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
January 23, 1963	Filed motion to dismiss appeal.
January 23, 1963	Filed motion papers and order denying motion for a stay.
January 23, 1963	Filed motion papers on motion to dismiss appeal.
January 23, 1963	Filed judgment (dismissing appeal).
February 8, 1963	Issued Mandate (judgment).
March 13, 1963	Filed transcript of minutes of argument of appeal.

In the District Court, January-July 1964

January 25, 1963	Filed plaintiff's notice of withdrawal of motion and application for extension of time.
January 25, 1963	Filed notice of motion for review of the order of Special Master of January 22, 1963.
January 25, 1963	Filed reply of additional defendant Metropolitan Life Insurance Co. to counterclaims.
January 25, 1963	Filed reply of additional defendant Equitable Life Assurance Society to counterclaims.
January 25, 1963	Filed reply of additional defendant Harry C. Hagerty to counterclaims.
January 25, 1963	Filed reply of additional defendant James F. Oates, Jr. to counterclaims.
January 25, 1963	Filed reply of additional defendants Irving Trust Co. and Ben-Fleming Sessel to counterclaims.

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
January 26, 1963	Filed notice of motion of additional defendants to adjudge defendant Hughes Tool Co. to be in civil contempt, etc. Returnable before Metzner, J.
January 26, 1963	Filed plaintiff's affidavit re: motion of additional defendants, etc.
January 28, 1963	Filed notice of application for order directing additional defendant Tillinghast to answer counterclaims of defendant Hughes Tool Co.
January 28, 1963	Filed affidavit of John F. Sonnett, in opposition to motion.
February 1, 1963	Filed memorandum of defendant Hughes Tool Co. in support of motion to dismiss.
February 1, 1963	Filed appendix to memorandum of defendant Hughes Tool Co. in support of motion to dismiss.
February 1, 1963	Filed Pre-Trial order, Metzner, J.
February 2, 1963	Filed TWA's Memorandum in support of its complaint.
February 2, 1963	Filed affidavit in opposition to pending motion of Hughes Tool Co. re: jurisdiction.
February 2, 1963	Filed folder marked Exhibit A.
February 2, 1963	Filed folder marked Exhibits B & C.
February 5, 1963	Filed reply of additional defendant Dillon, Read & Co. to counterclaims of defendant Hughes.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
February 6, 1963	Filed Notice of Motion for order that all further proceedings be stayed pending entering of final order by Civil Aeronautics Board with respect to Complaint of Hughes Tool Co. and Request for Investigation, etc. Returnable February 8, 1963.
February 6, 1963	Filed reply memorandum of Hughes Tool Co. supporting its motion to dismiss.
February 6, 1963	Filed memo endorsed on motion filed January 18, 1963. Upon consideration of defendants' brief filed on February 1, 1963 in support of the motion to dismiss, the answering brief of plaintiff filed on February 2, 1963 in opposition, defendants reply brief filed at noon today and the oral argument on said motion, the motion to dismiss is denied. A formal opinion giving the reasons of the court will follow. So ordered. Metzner, J. signed February 6, 1963 at 6:05 P.M.
February 7, 1963	Filed Opinion No. 28588 defendant Hughes Tool Co. motion to dismiss is denied. Toolco's application for stay of all deposition-discovery proceedings pending an application for stay to Court of Appeals granted, etc. So ordered. Metzner, J. Mailed notice February 8, 1963.
February 8, 1963	Filed notice of position (defendant Hughes Tool Co.).

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
February 11, 1963	Filed true copy of USCA judgment dismissing appeal for lack of jurisdiction.
February 11, 1963	Filed Reply of plaintiff Trans World Airlines, Inc. to counterclaims of defendant Toolco.
February 13, 1963	Filed Reply of additional defendant Charles C. Tillinghast, Jr. to counterclaims of defendant Hughes Tool Co. CPW&W
February 13, 1963	Filed affidavit and Notice of Motion returnable before Judge Metzner re: order granting reargument, etc. CGD
February 18, 1963	Filed motion returnable February 21, 1963 before Judge Metzner for dismissal, etc. CS&M
February 18, 1963	Filed affidavit and Show Cause Order to amend complaint, etc. Returnable February 21, 1963 before Judge Metzner.
February 21, 1963	Filed notice of amendment to notice of motion of Hughes Tool Co. CCD
February 21, 1963	Filed Memo endorsed on motion filed February 6, 1963; to stay proceedings; Motion denied. See page 56 of transcript of hearing held on February 8, 1963. So ordered, Metzner, J. Mailed notice February 25, 1963 (dated February 12, 1963).

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
February 21, 1963	Filed memo endorsed on motion filed January 26, 1963; motion deemed withdrawn in view of motion by same additional defendants. Returnable February 21, 1963—Metzner, J.
February 25, 1963	Filed affidavit of Chester C. Davis with copies of Exhibits A to C attached.
February 25, 1963	Filed memo endorsed on motion filed February 13, 1963; motion for reargument denied, motion for order referring stated questions denied; motion for order making certain orders of the CAB part of record is denied. Metzner, J. Mailed notice February 26, 1963.
February 25, 1963	Filed memo endorsed on motion filed February 21, 1963; this motion brought on to amend motion of February 13—is denied. So ordered. Metzner, J. Mailed notice February 26, 1963.
March 6, 1963	Filed transcript of record of proceedings for October 29, 1962.
March 6, 1963	Filed transcript of record of proceedings for January 9, 1963.
March 6, 1963	Filed transcript of record of proceedings for January 17, 1963.
March 6, 1963	Filed transcript of proceedings of January 28, and February 6, 1963.
March 6, 1963	Filed transcript of proceedings of February 8, 1963.

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List of Relevant Docket Entries

Date

Proceedings

March 6, 1963

Filed transcript of proceedings of February 21, 1963.

April 29, 1963

Filed memorandum of Hughes Tool Co. in opposition to the motion of TWA.

May 2, 1963

Before Metzner, J.—Pre-Trial hearing held.

May 3, 1963

Filed Opinion #28826. A judgment by default shall be entered in favor of TWA against Toolco and counterclaims asserted by Toolco shall be dismissed with prejudice. Damages to be awarded to TWA referred to Special Master. An immediate appeal from this order is justified, etc. So ordered, Metzner, J.

May 3, 1963

Filed memo endorsed on motion filed February 18, 1963. See opinion this date. Metzner, J.

May 28, 1963

Filed Opinion #28882. The sixth counterclaim of the Answer of Toolco, plaintiff's motion for summary judgment is granted, defendants' motion is denied. So ordered. Metzner, J. Mailed notice May 29, 1963.

May 28, 1963

Filed judgment that each and every counterclaim asserted in answer and counterclaims of the defendant Hughes Tool Co., except the sixth counterclaim is dismissed as against plaintiff with prejudice. Metzner, J. Judgment entered May 28, 1963. Clerk. Mailed notice

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
May 28, 1963	Filed judgment that additional defendants on counterclaims, Equitable Life; Metropolitan Life; Irving Trust Co.; Dillon, Read & Co.; Ben-Fleming Sessel; James F. Oates, Jr.; Harry C. Hagerty; and Charles C. Tillinghast, Jr. dismissing with prejudice this action and each of the counterclaims herein as to additional defendants with costs and disbursements in favor of said additional defendants against Hughes Tool Co. to be taxed by the Clerk, etc. Metzner, J. Judgment entered May 28, 1963. Clerk. Mailed notice May 29, 1963.
June 11, 1963	Filed defendants' notice of appeal—mailed copy to Cahill, Gordon, Reindel & Ohl, 80 Pine Street, New York, N. Y.
June 25, 1963	Filed transcript of record of proceedings of May 2, 1963.
June 26, 1963	Filed defendant's (Hughes Tool Co.) notice of appeal—mailed copies to Cahill, Gordon, Reindel & Ohl and attorneys Cravath, Swaine & Moore and attorneys Winthrop Stimson Putnam & Roberts and attorneys Dunnington Bartholow & Miller and attorneys Chadbourne Parke Whiteside & Wolff. (Mailed this date.)
July 31, 1963	Filed deposition of Tillinghast, Volumes 3 through 11. Filed deposition of Tillinghast, Volumes 12 through 15.

List of Relevant Docket Entries

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Proceedings

July 31, 1963

Filed: Volume 16, deposition of Leslie.
 Volumes 17 through 20, deposition of Rummel.
 Volume 21, deposition of Cocke.
 Volumes 22, 23, deposition of Leslie.
 Volume 24, deposition of Cocke.
 Volume 25, deposition of Leslie.
 Volume 26, deposition of Cocke.
 Volume 27, deposition of Leslie.

Filed: Volume 28, deposition of Cocke.
 Volumes 29 and 30, Oral arguments.
 Defendants Exhibits 1 through 369.
 (Filed individually) except for 344.
 Plaintiff's Exhibits 1, 2 and 3.
 TWA Exhibits A through E.
 Document Exhibit 1.
 Metropolitan Equitable Exhibit 1.
 Special Master's Exhibits 1 through 11.
 TWA Exhibits 4 through 8.

August 1, 1963

Filed: Memorandum of Defendant Hughes Tool Co.
 Memorandum of Defendant Hughes Tool Co.
 Reply memorandum of plaintiff in support of motion.
 Brief with respect to defendant Hughes Tool Co. Claimed defenses.
 Notice of settlement (plaintiffs).
 Plaintiff's memorandum in support of order.

August 1, 1963

Filed copy of proposed order by J. Lee Rankin, Special Master.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
August 1, 1963	Filed additional defendants' notice to take deposition.
August 1, 1963	Filed additional defendants' notice to take deposition.
August 1, 1963	Filed additional defendants' notice of motion for order pursuant to Rule 34.
August 1, 1963	Filed Memorandum of Certain Additional defendants in support of application.
August 1, 1963	Filed Plaintiff's memorandum in support of order of depositions.
August 1, 1963	Filed notice of motion to strike interrogatories.
August 1, 1963	Filed copy of motion to strike answer.
August 1, 1963	Filed notice of motion to strike answer of Hughes Tool Co.
August 1, 1963	Filed affidavit of K. F. Glenn.
August 1, 1963	Filed affidavit of Richard Grey.
August 1, 1963	Filed affidavit of Chester C. Davis.
August 1, 1963	Filed Hughes Tool Co. memorandum in opposition to motion for discovery.
August 1, 1963	Filed notice of motion re: taking of deposition, etc.
August 1, 1963	Filed plaintiff's memorandum in opposition to application, etc.
August 1, 1963	Filed Hughes Tool Co. notice of application.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
August 1, 1963	Filed Hughes Tool Co. motion for a direction.
August 1, 1963	Filed motion to commence deposition of Hughes.
August 1, 1963	Filed motion (confidential) to produce.
August 1, 1963	Filed Special Master's Order (confidential).
August 1, 1963	Entered this date, originally filed October 13, 1962, defendant Toolco's interrogatories to plaintiff.
August 1, 1963	Entered this date order originally filed December 18, 1961. Ordered to produce. Metzner, J.
August 1, 1963	Entered this date, originally filed October 23, 1962, transcript of record of proceedings for September 6, 1962.
August 9, 1963	Filed notice that the record on appeal has been certified to the U.S.C.A. for 2nd Circuit this 9th day of August, 1963.
August 24, 1963	Filed: Notice of Motion of Toolco before Judge Metzner for review of order of Special Master overruling Toolco's objections to TWA interrogatories, dated June 7, 1962. Proposed form of stipulation and order submitted by TWA—re: service of process on Howard Hughes, dated July 31, 1962.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
September 24, 1963	<p>Filed:</p> <p>Additional defendants' proposed form of order and judgment re: dismissal of Toolco's counterclaims with prejudice, dated February 1963.</p> <p>Proposed form of order submitted by TWA covering entry of a default judgment and dismissal of Toolco's counterclaims with prejudice, dated March 1963.</p> <p>Letter from Sonnett to Judge Metzner, enclosing copy of CAB's "Petition for Enforcement", etc., dated April 9, 1963.</p> <p>Letter from Sonnett to Judge Metzner, enclosing order of CAB No. E 19473, dated April 11, 1963.</p> <p>Notice that annexed proposed form of judgment order covering granting of default judgment will be submitted for settlement, signature and entry, dated May 8, 1963.</p>
September 27, 1963	Filed notice that the supplemental record on appeal has been certified to the U.S.C.A.
October 16, 1963	Filed notice that the record on appeal has been certified to the U.S.C.A. this date.
November 1, 1963	Filed stipulation and order—Motion of additional defendant Ernest R. Breech to dismiss the counterclaims of defendant Hughes Tool

*List of Relevant Docket Entries*DateProceedings

Co. be and the same hereby is withdrawn—Defendant Breech is deemed to have appeared in this action—Toolco is taking the same position with respect to additional defendant Breech as it has taken with respect to the other additional defendants.—Any judgment dismissing Toolco's counterclaims as against Breech by reason of the positions taken by Toolco shall be governed by the determination of the U.S.C.A. to the same extent and with the same force and effect as though Breech were a party to said appeal—Metzner, J.

November 1, 1963

Filed Judgment—in favor of additional defendant on counterclaims Ernest R. Breech dismissing with prejudice and without costs this action and each of the counterclaims of the defendant Hughes Tool Co. as to said additional defendant—Metzner, J.—Judgment Entered. November 1, 1963—Clerk. (Mailed notices November 6, 1963.)

July 8, 1964

Filed U.S.C.A. Judgment with opinion attached—The D.C. is found to have had jurisdiction of the action and that the orders of the Civil Aeronautics Board do not constitute a good defense to the antitrust claim of the plaintiff. Judgment Entered July 10, 1964. Clerk—entered and mailed notice—July 10, 1964.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
July 8, 1964	Filed U.S.C.A. Judgment with opinion attached—The orders of the D.C. is affirmed with exception of the said order dealing with the second counterclaim. Further ordered, adjudged and decreed that the second counterclaim be and it hereby is dismissed for lack of jurisdiction (opinion attached)—Judgment Entered—July 10, 1964. Clerk—entered and mailed notice July 10, 1964.
<i>In the Court of Appeals, May 1963-June 1965 [No. 28405]</i>	
May 13, 1963	Filed motion for leave to appeal under Rule 1292 (b).
May 17, 1963	Filed 4 tw copies answer to petition for leave to appeal; and exhibits in support.
June 6, 1963	Filed motion papers (endorsed) and order granting leave to appeal and stay.
August 2, 1963	Filed order extending time to file record on appeal to 8/9/63 of appeal of 6/11/63 and appeal of 6/26/63.
August 6, 1963	Filed motion to docket appeals separately.
August 8, 1963	Filed motion papers and order granting leave to docket separately the appeals of 6/11/63 and 6/26/63; appellants may file separate briefs and appendices in each appeal; and argument of the two appeals shall be heard at the same time.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
August 9, 1963	Filed record (original papers of District Court) (& in 28406).
August 12, 1963	Filed order (and in 28406).
September 4, 1963	Filed application and order granting leave to file appellants brief not to exceed 80 pages.
September 9, 1963	Filed 24 copies appendix, appellants (Hughes Tool Co. and Raymond M. Holliday)—Vol. I.
September 9, 1963	Filed 24 copies appendix, appellants (Hughes Tool Co. and Raymond M. Holliday)—Vol. II.
September 9, 1963	Filed brief, appellants (Hughes Tool Company and Raymond M. Holliday).
September 26, 1963	Filed order granting leave to file appellee's brief not to exceed 80 pages.
September 27, 1963	Filed supplemental record (original papers of District Court) (& in 28406).
September 30, 1963	Filed brief, appellee's (Trans World).
October 15, 1963	Filed application and order (endorsed) granting leave to file reply brief, appellants—of 30 pages).
October 15, 1963	Filed reply brief, defendants-appellants.
October 16, 1963	Filed supplemental record (original papers of District Court) (& in 28406).

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
November 12, 1963	Filed order granting leave to file rejoinder brief in behalf of appellee, (Trans World).
November 12, 1963	Filed rejoinder brief, appellee (Trans World).
November 13, 1963	Argument heard (by: Lumbard, Kaufman and Hays CJJ).
November 20, 1963	Filed rebuttal brief, appellants (Hughes Tool Co., and Raymond M. Holliday).
June 2, 1964	Jurisdiction found in the District Court, etc., Lumbard, Ch.J. (& in 28406).
June 2, 1964	Filed judgment.
July 7, 1964	Issued Mandate (opinion and judgment).
August 6, 1964	Original and supplemental records returned to District Court (& in 28406).
August 17, 1964	Received recalled original record from District Court (and in 28406).
August 19, 1964	Certified appendix and proceedings to Chester C. Davis.
August 26, 1964	Certified original record to Chester C. Davis (& in 28406).
September 1, 1964	Filed notice of filing of petition for writ of certiorari.
September 16, 1964	Filed notice of filing of petition for writ of certiorari (& in 28406).

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
November 20, 1964	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 28406).
November 20, 1964	Filed certified copy of order of Supreme Court granting petition for writ of certiorari.
March 10, 1965	Filed opinion of Supreme Court (& in 28406).
April 5, 1965	Filed certified copy of order of the Supreme Court dismissing writ of certiorari (& in 28406).
May 18, 1965	Original record received from Supreme Court (& in 28406).
June 3, 1965	Original and supplemental records returned to District Court.
June 8, 1965	Filed receipt of return of original & supplemental (2) record to District Court.
<i>In the Court of Appeals, May 1963-June 1965 [No. 28406]</i>	
August 2, 1963	Filed order extending time to file record on appeal to 8/9/63 of appeal to 6/11/63 and appeal of 6/26/63.
August 6, 1963	Filed motion to docket appeals separately.
August 8, 1963	Filed motion papers & order granting leave to docket separately the appeals of 6/11/63 and 6/26/63; appellants may file separate briefs & appendices in each appeal; and argument of two appeals shall be heard at same time.

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
August 9, 1963	Filed record (original papers of District Court) (Filed in 28405).
August 12, 1963	Filed order (filed in 28405).
September 9, 1963	Filed application and order (endorsed) granting leave to file appellant's brief not to exceed 54 pages.
September 9, 1963	Filed 24 copies appendix, appellant's (Hughes Tool Company).
September 9, 1963	Filed brief, appellant's (Hughes Tool Company).
September 27, 1963	Filed supplemental record (original papers of District Court) (filed in 28405).
September 30, 1963	Filed 24 copies appendix, appellee's (Trans World) (& in 28405).
September 30, 1963	Filed brief, appellee's (Trans World) (& in 28405).
October 1, 1963	Filed application and order (endorsed) granting leave to file a joint brief for additional defendants-appellees not to exceed 69 pages (filed in 28405).
October 1, 1963	Filed 24 copies appendix to joint brief, additional defendants-appellees (& in 28405).
October 1, 1963	Filed joint brief, defendants-appellees (& in 28405).
October 15, 1963	Filed application and order (endorsed) granting leave to file reply brief, appellant, of not more than 45 pp (& in 28405).

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
October 15, 1963	Filed reply brief, defendant-appellant (Hughes Tool) (& in 28405).
October 16, 1963	Filed second supplemental record (original papers of District Court) (& in 28405).
November 13, 1963	Argument heard (by: Lumbard, Kaufman and Hays CJJ).
June 2, 1964	Judgment Affirmed, except second counterclaim—Dismissed, Lumbard, Ch.J. (filed in 28405).
June 2, 1964	Filed judgment.
June 17, 1964	Filed petition for rehearing and petition for rehearing in banc.
July 6, 1964	Petition for Rehearing denied, Per Curiam.
July 6, 1964	Filed order denying petition for rehearing.
July 6, 1964	Petition for Rehearing in banc denied, Per Curiam.
July 6, 1964	Filed order denying petition for rehearing in banc.
July 7, 1964	Issued Mandate (opinion and judgment).
August 6, 1964	Original & supplemental records returned to District Court (filed in 28405).
August 17, 1964	Received recalled original record from District Court (filed in 28405).
August 19, 1964	Certified appendix and proceedings to Chester C. Davis.

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List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
August 26, 1964	Certified Original record to Chester C. Davis (filed in 28405).
September 16, 1964	Filed notice of filing of petition for writ of certiorari (filed in 28405).
November 20, 1964	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (filed in 28405).
March 10, 1965	Filed opinion of Supreme Court (filed in 28405).
April 5, 1965	Filed certified copy of order of the Supreme Court dismissing writ of certiorari (filed in 28405).
May 18, 1965	Original record received from Supreme Court (filed in 28405).
June 3, 1965	Original and supplemental records returned to District Court.
June 8, 1965	Filed receipt of return of original & supplemental (2) record to District Court (filed in 28405).

In the District Court, September 1965-August 1970

September 7, 1965	Filed memorandum of plaintiff in support of its motion to review failure of Special Master to make certain interim findings of fact.
September 7, 1965	Filed appendices to brief of plaintiff September 7, 1965.
September 21, 1965	Filed defendants' memorandum in opposition to plaintiff's motion to review Special Master's Refusal to make certain anticipatory findings.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
September 23, 1965	Filed plaintiff's notice of motion before Metzner, J. on August 31, 1965 for a review and reversal of the Opinion, etc. of the Special Master dated July 30, 1965.
September 24, 1965	Filed plaintiff's reply memorandum in support of its motion to review Special Master's Refusal to make certain interim Findings of Fact.
September 30, 1965	Filed defendants' supplemental memorandum in opposition to plaintiff's motion to review Special Master's refusal to make certain findings.
November 16, 1965	Filed Opinion #31817—The matter is returned to the Special Master to proceed in accordance with these views. So ordered—Metzner, J.—mailed notice.
December 21, 1965	Filed defendants' (Hughes Tool et ano.) notice of motion for pre-trial order—Returnable before Metzner, J. on December 30, 1965.
December 21, 1965	Filed brief of defendants Hughes Tool et ano. in support of motion.
December 29, 1965	Filed plaintiff's memorandum in opposition to defendants' motion for pre-hearing order.
December 29, 1965	Filed exhibits to TWA's memorandum of December 29, 1965.
December 29, 1965	Filed excerpts from Hughes Tool Co. 1959 and 1960 Federal Income Tax returns, etc.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
January 5, 1966	Filed Opinion #31936—defendants' motion for a pre-hearing order is denied. So ordered—Metzner, J.—mailed notice.
January 5, 1966	Filed order—the order of this Court dated March 3, 1963 is amended to the extent of designating Herbert Brownell, Esq. of 25 Broadway, New York City, as Special Master in place of J. Lee Rankin—Metzner, J.—mailed notices.
February 1, 1966	Filed transcript of record of proceedings of December 30, 1965.
February 4, 1966	Filed order—Provisions of the order dated May 10, 1962 providing for payment of compensation to the Special Master are made applicable to the new Special Master, except the payment shall be apportioned equally between TWA and Hughes Tool Co.—Metzner, J.
February 7, 1966	Filed Oath of Special Master.
April 1, 1966	Filed transcript of record of proceedings of September 30, 1965.
August 31, 1966	Filed Consent Order— <i>All Boeing Documents</i> received in evidence in this action shall be maintained in a sealed file in the custody of this Court or its clerks and none of the same shall be made available for examination by any person except by order of this Court upon good cause shown, etc.—Metzner, J.

*List of Relevant Docket Entries*DateProceedings

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|--------------------|--|
| December 2, 1966 | Filed order re: documents—Consented to—Metzner, J. |
| September 21, 1968 | Filed report of Herbert Brownell, Special Master. |
| September 21, 1968 | Filed notice of filing Special Master's Report. Mailed copies to: Cahill, Gordon, Sonnett, Reindel & Ohl and Donovan, Leisure, Newton & Irvine and Chester C. Davis. |
| November 1, 1968 | Filed defendants' objections to Special Master's Report. |
| November 1, 1968 | Filed plaintiff's (TWA) objections to report of Special Master, memorandum in support of objections and motion to modify and, as modified, to confirm report. |
| November 15, 1968 | Filed appendix to memorandum in support of defendants' objections to Special Master's Report. |
| November 15, 1968 | Filed memorandum in support of defendants' objections to Special Master's Report. |
| December 2, 1968 | Filed defendants' Hughes Tool & Raymond Holliday Notice of Motion—objecting to the findings and conclusions. |
| December 2, 1968 | Filed defendants' memorandum in opposition to plaintiff's objections to report of Special Master. |
| December 2, 1968 | Filed plaintiff's memorandum in answer to memorandum in support of defendants' objections. |

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
January 20, 1969	Filed transcript of record of proceedings September 27, 1968—Metzner, J.
December 23, 1969	Filed Opinion #36406— * * * Conclusion—The report of the Special Master awarding damages in sum of \$137,611,435.95 pursuant to 15 U.S.C. Sec. 15 is confirmed—So Ordered. Metzner, J.
December 31, 1969	Filed plaintiff's affidavit, applications and notice of motion for an order determining and awarding to Trans World Airlines, Inc., its cost of suit including attorney's fee, directing clerk to enter judgment in favor of Trans World against defendant Hughes Tool Co. and Raymond M. Holliday in amount of \$137,611,435.95 plus cost of suit, including reasonable attorney's fees as determined and awarded by Court. Returnable January 21, 1970.
December 31, 1969	Filed plaintiff's memorandum with respect to interest.
January 16, 1970	Filed Defendants' memorandum in opposition to plaintiff's application for counsel fees, cost of suit and pre-judgment interest.
January 16, 1970	Filed affidavit of James V. Hayes, attorney for defendants Hughes Tool Co. and Raymond M. Holliday

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
	in opposition to plaintiff's application for an order awarding to plaintiff. Attached are exhibits and affidavit by Chester C. Davis.
January 21, 1970	Filed supplemental affidavit of Dudley B. Tenney; supplemental affidavit of Marshall H. Cox, Jr. and affidavit of Lee H. Lasher.
January 21, 1970	Filed TWA's reply memorandum.
January 30, 1970	Filed defendants' Hughes Tool Co. and Raymond M. Holliday affidavit and notice of motion for order granting partial new trial and reopening the case.
January 30, 1970	Filed defendants' memorandum in support of motion for a partial new trial.
February 9, 1970	Filed plaintiff's Memorandum in response to defendants' motion for a partial new trial.
February 11, 1970	Filed defendants' reply memorandum.
April 13, 1970	Filed Memorandum Endorsed on motion papers filed January 30, 1970, "This motion is denied—So Ordered: Metzner, J." Mailed, notice.
April 13, 1970	Filed Exhibits A, B, C.
April 13, 1970	Filed affidavit of Chester C. Davis, attorney for defendant Hughes Tool Co. in opposition to plaintiff's motion for order determining and awarding to TWA its costs of suit herein, including a reasonable attorney's fee and directing Clerk to enter judgment.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
April 13, 1970	Filed Opinion #36691 by Metzner, J.—“Plaintiff moves for award of reasonable attorneys fees and costs of suit.—Reasonable attorneys fee in this case is \$7,500,000. Plaintiff requests \$2,230,602, as the costs of suit—This request is accordingly denied. Judgment shall be entered accordingly. So Ordered: Metzner, J.” Mailed notice.
April 14, 1970	Filed Judgment #70623—That the plaintiff Trans World Airlines, Inc. recover of the defendants Hughes Tool Co. and Raymond M. Holliday, the sums of \$137,611,435.95 as damages, \$7,500,000.00 as a reasonable attorney's fee and \$336,705.12 as costs, for a total amount of \$145,448,141.07, together with interest thereon at the rate of 6% as provided by law—Metzner, J. Judgment entered April 14, 1970—Clerk. Mailed notice ENT: April 16, 1970.
April 30, 1970	Filed Transcript of record of proceedings dated January 21, 1970.
May 5, 1970	Filed defendants' memorandum in support of application for a stay of execution pending appeal.
May 5, 1970	Filed affidavit and Order that the plaintiff Show Cause before Metzner, J. on May 11, 1970 why an order should not be entered granting a stay, pending appeal, of execution of the judgment entered on April 14, 1970. Metzner, J. Mailed notice.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
May 5, 1970	Filed defendants' Notice of Appeal—\$5.00. Copy mailed to Cahill, Gordon, Sonnett, Reindel & Ohl.
May 5, 1970	Filed Bond for Undertaking for costs on appeal in sum of \$250 by National Surety Corp.
May 8, 1970	Filed plaintiff's Memorandum in Opposition to defendants' application for stay of execution without adequate bond.
May 11, 1970	Filed Bond for Undertaking for costs in the sum of \$250 by U. S. Fidelity and Guaranty Co.
May 11, 1970	Filed plaintiff's Notice of Appeal—\$5.00. Copy mailed to Donovan Leisure Newton & Irvine.
June 3, 1970	Defendant moves to have transcripts of the proceedings sealed—motion granted. Motion submitted after argument. Metzner, J.
June 5, 1970	Filed Transcript of hearing before Court on June 3 relating to defendants' motion for stay of execution of judgment. Transcript is sealed by order of Court and not to be opened unless further order of the Court. So Ordered: Metzner, J.
June 6, 1970	Filed Transcript of record of proceedings, dated May 11, 1970.
June 11, 1970	Filed letter from Toolco's counsel dated June 3, 1970, with financial information submitted to the Court at the hearing on June 3, 1970. This envelope to be opened only upon order of the Court. June 10, 1970—Metzner, J.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
June 10, 1970	Filed Memorandum of plaintiff in opposition to continued stay of execution without security.
June 10, 1970	Filed letter from Cahill, Gordon, Sonnett, Reindel & Ohl to Metzner, J., dated May 19, 1970.
June 10, 1970	Filed letter from Chester Davis, dated May 19, 1970 to Metzner, J.
June 10, 1970	Filed Opinion #36856 by Metzner, J. " * * * Counsel are directed to meet in continuous session and appear before the court on June 16 in Room 1106 at 10:30 A.M. in form that any needed resolution of disputes can easily be disposed of. So Ordered: Metzner, J." Mailed notice.
June 16, 1970	Filed Consent Order that the execution of the judgment in favor of TWA entered on April 14, 1970 be stayed pending the determination by the U. S. Court of Appeals for the 2d Circuit with provision as indicated. Metzner, J.
June 18, 1970	Filed Consent Order that the time for transmitting the record on appeal to the Court of Appeals for the 2d Circuit be extended to the 7th day of July, 1970. Metzner, J.
June 22, 1970	(Filed April 13, 1970) Entered letter from Cahill, Gordon, Sonnett, Reindel & Ohl to James V. Hayes of Donovan Leisure Newton & Irvine dated December 31, 1969.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
June 25, 1970	Filed Order that Letter of Credit as indicated is to be filed by July 12, 1970 and Clerk is to retain said letter until judgment becomes final, etc. under conditions indicated. Metzner, J. Mailed notice.
July 1, 1970	Filed Box (a) containing transcripts of damage hearings before Special Master numbered 554-1 thru 554-16 inclusive.
July 1, 1970	Filed Box (b) containing transcripts of damage hearings before Special Master numbered 554-17 thru 554-32 inclusive.
July 2, 1970	Filed stipulation and order that time to transmit record on appeal shall be extended from July 7, 1970 to July 21, 1970. So Ordered: Weinfeld, J.
July 2, 1970	Filed stipulation and order that the following enumerated documents be deemed docketed in the action and part of the record on appeal as indicated. So Ordered: Weinfeld, J.
July 10, 1970	Filed Stipulation that the record on appeal shall be retained in the district court until such time as the Court of Appeals or any party shall request transmittal of said record or parts thereof.
July 10, 1970	Filed Bond dated June 26, 1970 that defendants Hughes Tool Co. & Raymond Holliday are held and firmly bound unto the above named Trans World Airlines, Inc. in sum of \$161,447,686.59.

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
July 10, 1970	Filed Letter of Credit and documentation dated July 1, 1970.
July 13, 1970	Filed Notice that the record on appeal has been certified but not transmitted to U.S.C.A. for 2d Circuit this 13th day of July, 1970, by virtue of document #557 which provides for the retainment of the documents in the District Court until any party requests the transmittal of said record or any parts thereof.
August 26, 1970	Filed Transcript of record of proceedings, dated June 25, 1970.
August 26, 1970	Filed Transcript of record of proceedings, dated May 20, 1970.
August 26, 1970	Filed Transcript of record of proceedings, dated April 29, 1970.
August 26, 1970	Filed Transcript of record of proceedings, dated June 16, 1970.

In the Court of Appeals, 1970-1972

May 7, 1970	Filed statement of docket entries and copy of notice of appeal (Hughes Tool Co. & Holliday).
May 13, 1970	Filed statement of docket entries and copy of notice of appeal (Trans World Airlines, Inc.).
May 14, 1970	Received docket fee.
July 2, 1970	Filed order deferring appendix re 30(C); plaintiff-appellant's brief filed by 8-3-70; defendants-appellants' brief to 10-15-70; plaintiff.

*List of Relevant Docket Entries*DateProceedings

- Appellant's reply brief by 12-1-70;
 Defendants-appellants' reply brief
 by 12-22-70; joint appendix by 12-
 31-70; copies of previously filed
 briefs by 1-15-71; further extension
 of defendants-appellants brief to
 1-15-70, in the event of such fur-
 ther extension, the times for filing
 the further briefs shall be extended
 by the same number of days.
- August 4, 1970 Filed application and order grant-
 ing leave to file appellant's brief
 not to exceed 83 pages.
- November 11, 1970 Filed order granting leave to file
 appellant's brief not to exceed 230
 pages, and four annexes not to ex-
 ceed 80 pages.
- December 10, 1970 Filed order that Plaintiff-Appel-
 lant's reply brief shall be filed by
 1-29-71; Defendant-Appellants' re-
 ply brief filed 21 days after filing
 of Plaintiff-Appellant's reply brief;
 joint appendix shall be filed 30 days
 after Plaintiff-Appellant's reply
 brief, and copies of previously filed
 briefs, revised to refer to pages of
 the joint appendix, shall be filed 45
 days after filing of Plaintiff-Appel-
 lant's reply brief.
- January 18, 1971 Filed order granting motion for
 leave to file an over-size reply
 brief.
- February 9, 1971 Filed stipulation and order (en-
 dorsed) extending time to file de-
 fendant-appellants reply brief to

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
	2-26-71; Joint appendix filed by 3-3-71; copies of previously filed briefs, revised to refer to pages of the Joint appendix filed by 15 days after filing of Joint appendix.
February 25, 1971	Filed order granting motion for leave to file oversized reply brief in excess of 25, but not more than 55, printed pages and one annex not to exceed 40 pages (& in 35114).
March 4, 1971	Filed order extending time to file Joint appendix to 3-5-71 and copies of previously filed briefs, revised to refer to pages of appendix extended to 15 days after filing of joint appendix (& in 35114).
March 5, 1971	Filed joint appendix (Volumes I thru VII) with proof of service (& in 35114).
March 22, 1971	Filed answering brief, appellant (Trans World Airlines, Inc.) (& in 35114).
March 22, 1971	Filed brief, appellant (Trans World Airlines, Inc.) (& in 35114).
March 22, 1971	Filed brief, appellants (Hughes Tool Co. & Holliday) (& in 35114).
March 22, 1971	Filed reply brief, appellants (Hughes Tool Co. & Holliday) (& in 35114).
May 7, 1971	Argument heard (by: Smith, Kaufman & Hays, CJJ) (& in 35114).
June 15, 1971	Filed minutes of argument of appeal (& in 35114).

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
September 1, 1971	Judgment affirmed as modified, Kaufman, CJ (& in 35114).
September 1, 1971	Filed judgment (& in 35114).
September 15, 1971	Filed motion for allowance of costs with proof of service (& in 35114).
September 15, 1971	Filed petition for rehearing and rehearing en banc with proof of service (& in 35114).
September 17, 1971	Filed affidavit in opposition to motion for allowance of costs with proof of service (& in 35114).
September 28, 1971	Filed order denying petition for rehearing (& in 35114).
September 28, 1971	Filed order denying petition for rehearing en banc (& in 35114).
September 28, 1971	Filed motion to stay issuance of mandate with proof of service (& in 35114).
September 29, 1971	Filed order granting motion to allow costs to Trans World Airlines, Inc. the sum of \$68,725.51, to be taxed against Hughes Tool Company (& in 35114).
October 7, 1971	Filed order granting motion to stay issuance of mandate, etc. (& in 35114).
October 13, 1971	Filed motion to renew and amend motion for stay of mandate with proof of service (& in 35114).
October 18, 1971	Filed order denying motion to renew and amend motion to stay mandate; etc. (& in 35114).

List of Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
October 20, 1971	Certified original record & proceedings for: Donovan, Leisure, Newton & Irvine, Esqs. (& in 35114).
November 1, 1971	Filed receipt by Supreme Court of original record (& in 35114).
November 30, 1971	Filed copy of notice of Supreme Court granting motion to stay mandate (& in 35114).
February 28, 1972	Filed certified copy of order of Supreme Court granting writ of certiorari (Hughes) (& in 35114).
February 28, 1972	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (Trans World) (& in 35114).

TWA Complaint

[Doc. 1]

[CAPTION] Civil Action No. 61-2324

COMPLAINT

Plaintiff, by its attorneys, Cahill, Gordon, Reindel & Ohl, for its complaint herein against the above-named defendants, respectfully alleges:

FIRST CLAIM

I.

Nature of Claim and Jurisdiction of Court

1. This complaint is filed and this action instituted against defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26 (1958)) in order to declare, to prevent and restrain, and to recover damages resulting from, the violation by defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), and of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. (1946 Ed.) § 18).

II.

Description of Parties

2. Plaintiff (hereinafter sometimes called "TWA") is a corporation organized in 1934 and existing under the laws of the State of Delaware and maintains its principal executive offices in the City of New York. TWA is the only air carrier authorized under Certificates of Public Convenience and Necessity granted by the Civil Aeronautics Board to

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provide both transcontinental and transatlantic scheduled air transportation in the interstate and foreign commerce of the United States, and is now providing such transportation, in competition at various points with various other United States-Flag and foreign-flag air carriers.

3. Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") is a corporation organized and existing under the laws of the State of Delaware, has assets of several hundred million dollars, transacts business within the Southern District of New York, and was and is engaged in interstate commerce, *inter alia*, since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") was, throughout the period of the matters hereinafter complained of, and is an officer and the sole stockholder of Toolco and directed, controlled and dominated its activities.

5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and to date has been a director of TWA.

6. Atlas Corporation, named herein as a co-conspirator but not as a defendant (hereinafter called "Atlas"), is a corporation organized in 1936 and existing under the laws of the State of Delaware. Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an

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air carrier engaged in the business of providing scheduled air transportation in interstate commerce, and for some years past has been and is now controlled by Atlas, by means, *inter alia*, of the ownership by Atlas of 58% of the stock of Northeast. The defendant Hughes for some years past has had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

III.

Commerce Involved

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. § 1301.

(b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities between which in each instance TWA provides more

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than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance TWA provides the only scheduled air transportation provided by United States-Flag air carriers.

(f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States.

8. The nature and extent of such trade and commerce with respect to TWA is more fully described as follows:

- (a) TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States. The scheduled air transportation provided by TWA in the United States has been and is a substantial proportion of that provided by all air carriers within the United States. During the periods set forth below, TWA provided the percentages set forth below of all scheduled passenger miles provided by all domestic scheduled trunk air carriers within the United States:

Year 1955	14.9%
Year 1956	15.1%
Year 1957	14.9%
Year 1958	15.0%
Year 1959	16.3%
Year 1960	15.2%

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(b) Since 1946, TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia. The scheduled air transportation provided by TWA between the United States and certain foreign cities has been and is a substantial proportion of that provided by all United States-Flag air carriers and of that provided by all air carriers. During the periods set forth below, TWA provided the percentages set forth below of all passenger miles provided by scheduled United States-Flag air carriers between the United States and foreign cities:

	<i>% of U. S.-Flag</i>
Year 1955	13.6%
Year 1956	12.9%
Year 1957	12.0%
Year 1958	12.5%
Year 1959	9.5%
Year 1960	12.5%

(c) In its operations, TWA has used, and is using, both in its domestic operations and in its international operations, a substantial proportion of all of the aircraft, both jet-powered and otherwise, operated by all scheduled air carriers operating within the United States, by all of the United States-Flag scheduled air carriers operating between the United States and foreign cities and by all of the scheduled air carriers operating between the United States and foreign cities.

(d) TWA provides and has provided a substantial proportion of the scheduled transportation in jet-powered aircraft provided by all carriers within the United States, by all United States-Flag air carriers between the United States and foreign cities and by all air carriers between the United States and foreign cities. In 1959, TWA provided over 1.1

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billion passenger miles of scheduled jet air transportation.

(e) The requirements of TWA for commercial jet-powered aircraft constitute and have constituted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia*, of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA.

(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. For example, during the period 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of \$100,000,000, which aircraft were manufactured by manufacturers in various states of the United States.

(g) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial jet-powered aircraft, both long-range and otherwise, made by United States manufacturers. For example, TWA currently has more than \$150,000,000 worth of jet-powered aircraft on order.

(h) TWA constitutes and has constituted a dominant portion of a substantial market for aircraft, that is, the market for aircraft for use between certain pairs of United States cities and between the United States and certain foreign cities. In 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, such transportation amounting to 332,000,000 passenger miles accommodating 391,000 passengers and accounting for approximately 7.8% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 90% and

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100% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 680,000,000 passenger miles accommodating over 1,000,000 passengers and accounting for approximately 16.0% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 80% and 90% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 331,000,000 passenger miles accommodating 649,000 passengers and accounting for approximately 7.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 70% and 80% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 417,000,000 passenger miles accommodating 412,000 passengers and accounting for approximately 9.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 60% and 70% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 218,000,000 passenger miles accommodating 251,000 passengers and accounting for 5.1% of the domestic passenger miles provided by TWA in 1959. Thus, in 1959, TWA provided more than 60% of the passenger miles between certain pairs of United States cities, such transportation by TWA amounting to almost 2 billion passenger miles accommodating more than 2.7 million passengers and accounting for 46.5% of the domestic passenger miles provided by TWA in 1959. TWA is the only United States-Flag air carrier which is now authorized to provide scheduled air transportation of passengers between the United States and any of the following cities: Athens, Geneva, Zurich, Milan, Algiers, Tunis, Cairo, Tel

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Aviv, Dahrán, Bombay and Colombo. Long-range aircraft are used by TWA between the United States and the above-named foreign cities; all other aircraft used by TWA are usable between one or more of the pairs of United States cities between which TWA provides the only scheduled air transportation. TWA in 1959 provided the following percentages of the scheduled air transportation measured by number of transatlantic passengers provided by all air carriers between the United States and the three principal ports of entry (London, Paris and Lisbon) into Europe, Africa and Southwest Asia: United States-London, 11%; United States-Paris, 17%; United States-Lisbon, 32%.

(i) In 1960, operating revenues of TWA were substantially in excess of \$300,000,000; net income was in excess of \$6,000,000. During the first quarter of 1961, TWA had an operating loss of approximately \$13,000,000 and a net loss of approximately \$9,000,000.

IV.

The Offenses Charged

9. Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defendants, Atlas and other persons acting for each of them have been and are now engaged in:

(a) A combination and conspiracy to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act;

(b) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Toolco;

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(c) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by requiring plaintiff to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco;

(d) A combination and conspiracy to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States in violation of Section 2 of the Sherman Act;

(e) An attempt to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States in violation of Section 2 of the Sherman Act;

(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

(g) Acquisitions of the stock of a corporation in violation of Section 7 of the Clayton Act.

10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia*:

(a) That Toolco would become a dominant source of supply of jet-powered aircraft to air carriers;

(b) That the defendants would seize control over TWA and its business and use such control for their own purposes;

(c) That Toolco would become the sole source of supply of jet-powered aircraft to TWA;

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(d) That defendants would have TWA as a captive market and would supply the requirements of TWA for aircraft, including jet-powered aircraft, upon terms advantageous to themselves;

(e) That the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means;

(f) That suppliers of aircraft to TWA other than the defendants would be boycotted and foreclosed from the trade and commerce hereinbefore alleged;

(g) That defendants would supply TWA with the aircraft essential to its business only on the condition that TWA would accept such financing arrangements relating to the aircraft as the defendants dictated, and in turn that defendants would allow TWA to procure financing essential for the acquisition of the aircraft it needed only on the condition that TWA would accept such aircraft as the defendants dictated; and

(h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged.

V.

Acts Committed Prior to December 1960

11. Commencing in or about the year 1939 and at various times thereafter, Toolco, pursuant to an understanding with and at the direction of Hughes, acquired Common Stock of TWA. By such acquisitions, Toolco acquired more than 78% of such Common Stock. The purpose and the effect of the acquisitions so made and the use by defendants of the stock so acquired have been to foreclose competing

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suppliers of aircraft from the opportunity for supplying aircraft to TWA.

12. Since in or about 1955 one of the most important single factors in the operation of and competition among air carriers engaged in air transportation in interstate and foreign commerce has been the prospect, introduction and eventual utilization of jet-powered aircraft.

13. By 1955, aircraft manufacturers (including Boeing Company, hereinafter called "Boeing", and Douglas Aircraft Company, Inc., hereinafter called "Douglas") had prepared—to the general knowledge of the air carrier industry—plans and drawings and otherwise had undertaken preparations for the manufacture by themselves of jet-powered aircraft intended for use by air carriers. Beginning in or about 1955, many air carriers devoted substantial efforts of their own (a) to determining whether the jet-powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them in their respective operations, and (b) to obtaining jet-powered aircraft suitable for their needs, including the participation by them in the design of such aircraft. Boeing and Douglas each contemplated the manufacture of and did ultimately manufacture jet-powered aircraft for short-range flights and for medium and long-range flights suitable for the respective needs of such air carriers.

14. Prior to 1955, defendants and General Dynamics Corporation (hereinafter called "Convair") entered into an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA. In furtherance of that arrangement, the defendants required TWA to provide to the defendants and Convair the use of

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TWA's highly skilled engineering and other personnel, who were to participate and did participate in the design and development of the aircraft to be manufactured by Convair. It was the intention of defendants that TWA would serve as a captive market for such aircraft which Toolco would procure to supply to TWA and other air carriers. A jet-powered aircraft, designated as Model 18, was so designed. In 1955, the defendants and Convair concluded that the continued development of, and manufacture of, Model 18 was not in their respective self-interests, and the program for its development and production was then abandoned.

15. Prior to May 1, 1956, the defendants also entered into a plan under which Toolco would itself commence the manufacture of a jet-powered aircraft with design and range characteristics making it suitable for use on both domestic and transatlantic routes. The defendants intended that Toolco would furnish this aircraft, to be known as the "Golden Arrow", by sale, lease or other means both to TWA and to other air carriers. Activities looking to such manufacture by Toolco of the "Golden Arrow" were actively pursued until in or about mid-1956, and were thereafter abandoned by the defendants.

16. In or about October 1955, at approximately the time of the decision to abandon the Model 18, the first firm order for jet-powered aircraft was placed with a United States aircraft manufacturer by a United States-Flag air carrier; that order was placed with Boeing by Pan American World Airways, Inc., TWA's principal international competitor. In the ensuing month and a half, principal United States and foreign air carriers—including major competitors of TWA—placed orders for jet-powered aircraft with Boeing or Douglas. These air carriers ordered 59 jet-powered aircraft from Boeing and 95 jet aircraft from Douglas, which orders were scheduled for delivery in 1959 and 1960.

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17. During this period when other United States-Flag air carriers were placing orders for jet-powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft. In or about February 1956, the defendants arranged for Toolco to place orders for 15 jet-powered aircraft with Boeing. Thereafter, the defendants arranged for Toolco to place orders with Boeing for an additional 18 jet-powered aircraft. In or about April 1956, the defendants arranged for Toolco to place orders for at least 30 Model 880 jet-powered aircraft to be manufactured by Convair.

18. The purchase orders placed by Toolco with Convair and Boeing reserved to Toolco the privilege of assigning to TWA the right to acquire the jet-powered aircraft so purchased. Despite repeated requests by TWA, Toolco refused throughout the period of 1956 to 1960 to assign to TWA the rights to acquire such aircraft. In or about June, 1959, defendants caused six of the Boeing jet-powered aircraft then on order by Toolco to be diverted to the principal transatlantic competitor of TWA.

19. During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but the defendants prevented TWA from arranging with Convair for certain design modifications which were desired by TWA and which would not have interfered with the scheduled dates of delivery. During the year 1960 the defendants also prevented and restricted TWA from making acceptance and test flights from time to time of various specific Convair Model 880 aircraft then on order with Convair by Toolco.

20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered air-

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craft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA.

21. Prior to May 1960, the exact date being unknown to TWA, Atlas, with knowledge of the conspiracy and other violations of antitrust laws herein alleged, then joined with the defendants in said violations, and agreed to cause Northeast to submit to TWA a proposed agreement of merger upon terms advantageous to the defendants and Atlas and disadvantageous to TWA. The purposes of defendants and Atlas in proposing such a merger were

(a) To enlarge TWA's requirements for new aircraft, and thereby to enlarge the demand in the market from which the defendants had foreclosed and would continue to foreclose all other suppliers, and

(b) For Atlas to obtain stock of TWA on terms advantageous to Atlas and its stockholders, including defendant Hughes.

Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the East Coast of the United States and Canada. In 1959 Northeast's revenue passenger miles totaled 519,000,000 and its total assets exceeded \$35,000,000.

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22. In November 1960, while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six of the Convair Model 880 aircraft which Toolco had ordered from Convair. Among the aircraft so leased to Northeast were three aircraft which Toolco previously by an agreement with TWA of May 9, 1960, had assigned to TWA.

23. Subsequent to the acquisition of stock by Toolco in TWA, defendants for reasons of self-interest continuously refused to allow equity financing by TWA except on condition that, as a result of any such financing, Toolco would be enabled to increase its equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing. TWA was thus rendered unable to seek the financing it needed for the acquisition of aircraft except upon the approval of defendants. The purpose of the defendants in rendering TWA dependent upon them for such assistance in financing as defendants might choose to provide, and the effects thereof, were, among other things,

(a) to create and maintain control in the defendants of the business of financing the purchase of aircraft for use by TWA, and

(b) to strengthen defendants' control over the acquisition of aircraft by TWA.

24. From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition of such aircraft of the type and in the manner dictated by the defendants.

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25. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to themselves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from $4\frac{1}{4}\%$ to $4\frac{3}{4}\%$.

28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately $6-6\frac{1}{2}\%$.

VI.

*The Financing and Acquisition of Jet Aircraft
by TWA in and since December 1960*

29. In connection with TWA's acquisition from Toolco in December 1960 of certain jet-powered aircraft and the rights to obtain certain additional jet-powered aircraft from Boeing and Convair and in connection with other

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financial transactions between TWA and Toolco, TWA delivered to Toolco a note dated December 30, 1960 for \$100,000,000, carrying an interest rate of 6½%, which note was subordinated to the indebtedness of TWA to various banks and insurance companies for additional funds needed by TWA for the purchase of these aircraft.

30. As part of the arrangements with Toolco above described, TWA agreed to offer to its stockholders not less than \$100,000,000 of its subordinated income debentures, with attached warrants to purchase common stock of TWA; the debentures were subordinated to TWA's senior indebtedness to banks and insurance companies. Toolco agreed to purchase, not later than three business days after expiration of the subscription offer, a principal amount thereof equal to the excess of \$100,000,000 over the principal amount purchased by others in the offering; Toolco also was given the option to purchase, not later than three business days after the expiration of the subscription offer, all or any part of the debentures not purchased by stockholders pursuant to the subscription offer.

31. As part of the arrangements with Toolco and with banks and insurance companies as above described, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and defendant Holliday) executed an agreement dated as of December 15, 1960. The agreement provided that the TWA stock owned and to be owned by Toolco would be placed in a Voting Trust, pursuant to which the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies.

TWA Complaint

32. The creation of the Voting Trust above described was required by the financial institutions as a condition to making loans to TWA of \$165,000,000 also needed for the purchase of the aforesaid aircraft, and which loans were evidenced by a like amount of senior notes of TWA.

33. The Voting Trust, in which Toolco's TWA stock has been deposited pursuant to the terms of the Voting Trust, provides in Article Thirteenth thereof that it shall terminate on December 15, 1970, unless previously terminated or extended as provided therein.

34. Thereafter and in early 1961, at a meeting of stockholders of TWA, the Voting Trustees, by majority vote, and other stockholders of TWA entitled to vote duly elected a Board of Directors of TWA and said Board of Directors elected a new President of TWA.

35. In March 1961, after careful consideration of TWA's requirements for additional jet-powered aircraft, the officers of TWA who were concerned with such matters unanimously recommended to the Board of Directors of TWA that TWA's immediate needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately \$187,500,000. Of this amount, TWA expects to provide approximately \$40,500,000 from its own funds and to borrow \$147,000,000. The borrowing is currently being negotiated with certain insurance companies and banks.

TWA Complaint

VII.

Acts Committed Subsequent to 1960

36. On and after December 31, 1960, the defendants, despite the execution of the Voting Trust above described and the deposit of Toolco's TWA stock in said Trust, continued and renewed the offenses described in Paragraphs 9 through 28 above, as hereinafter alleged.

37. Since during the month of May 1961, the defendants have insistently demanded of TWA that TWA not purchase from Boeing the aircraft described above, but instead that TWA purchase from Toolco 13 Convair Model 990 aircraft which Toolco had previously agreed to purchase from Convair, despite the decision of TWA's Board of Directors, which was known to defendants, that such Convair aircraft are not as suitable for TWA's needs as the aircraft which TWA wishes to purchase and is purchasing from Boeing.

38. During the month of May 1961, defendants wrongfully attempted to coerce TWA into purchasing Convair aircraft from Toolco by maliciously asserting for the first time (a) that TWA might have an obligation to purchase such aircraft from Toolco, (b) that the management of TWA would be derelict in its duty to Toolco if it failed to make such purchases, (c) that TWA's management was without authority to reach decisions on behalf of TWA with respect to such purchases or alternatives thereto, and (d) that the proposed purchases of aircraft from Boeing were not in the interest of TWA. Defendants also sent telegrams and other urgent messages to TWA, threatening TWA, its directors, the Voting Trustees and the financial institutions lending money to TWA with the institution of

TWA Complaint

a suit or suits against TWA, its management, its directors and the Voting Trustees unless TWA decided to purchase and did purchase the Convair aircraft.

39. During the month of May 1961, the defendants also warned Boeing that its contract with TWA was not binding upon TWA. The defendants hereby maliciously sought to interfere with, to impair and to disrupt the contractual relationship, known to the defendants, between Boeing and TWA, to the advantage of defendants and disadvantage of TWA.

40. The agreements made in December 1960, relating to the financing of TWA's purchase of jet aircraft, required, among other things, that TWA make, not later than May 31, 1961, a public offering of rights to purchase its subordinated income debentures with common stock warrants. In accordance with the provisions of those agreements, the Board of Directors of TWA approved the filing with the Securities and Exchange Commission of a Registration Statement relating to the proposed public offering and such Registration Statement was filed with the Securities and Exchange Commission on March 30, 1961.

41. TWA, in order to comply with its obligation to make the proposed public offering prior to May 31, 1961 as agreed, requested the Securities and Exchange Commission to accelerate the effective date of the Registration Statement to May 18, 1961. Thereupon defendants filed objections with the Securities and Exchange Commission to the request of TWA and demanded that the proposed offering be deferred on the ground, among others, that Toolco had decided for the first time on May 10, 1961 to make a public distribution of the debentures which were being offered by TWA and which were to be acquired by Toolco pursuant to the provisions of the prior agreements.

TWA Complaint

42. Defendants further demanded that certain amendments be made to the Registration Statement in order to set forth, among other things, certain contentions of defendants then made for the first time by defendants, including, among others:

(a) that notwithstanding the admitted legal power of the Voting Trustees to act, the Voting Trust could not be given effect according to its terms so as to enable TWA to be operated independently of the wishes of the defendants;

(b) that Toolco's position was that it had been compelled to enter into the Voting Trust under conditions which would warrant an immediate termination of the Voting Trust;

(c) that Toolco was considering an attempt to enjoin the consummation of the Boeing purchase transaction above described or taking action for damages against the persons responsible for the Boeing agreements; and

(d) that there might be some basis upon which Toolco could assert an equitable right to sell to TWA the Convair aircraft previously ordered by Toolco.

43. After considering the contentions so advanced by defendants, the Securities and Exchange Commission accelerated the effective date of the Registration Statement, as amended, so as to make the Registration Statement effective on May 24, 1961.

44. After the effective date of the Registration Statement and while the public offering was in progress, the defendants publicly announced that they proposed to sell up to 85% of the rights to purchase subordinated debentures which defendants were obligated to acquire under the terms of the aforesaid agreements, with the result that there was a substantial decrease in the prices at which such rights could be sold and were sold to the public.

TWA Complaint

45. The contentions made by the defendants as alleged in Paragraph 42 above and the public announcement made by the defendants as alleged in Paragraph 44 above were made for the purpose and with the intention that they would receive wide public circulation, would substantially decrease the prices at which the aforesaid rights could be sold to the public, and would thereby impair and discourage TWA's efforts to obtain financing from sources other than the defendants, and would enable the defendants to continue to condition the furnishing of financing to TWA by defendants upon TWA's acquiring jet-powered aircraft only from defendant Toolco.

46. Defendants also warned the insurance companies and banks from which TWA was then attempting to arrange the immediate borrowing of \$30,000,000 of short-term funds and the borrowing of \$147,000,000 of secured funds required for the purchase of the Boeing aircraft as hereinabove alleged, that the Voting Trust was invalid and that any such financing by them would be invalid. Such warnings were made by defendants maliciously and wilfully and with the intent and purpose of disrupting and discouraging TWA's efforts to obtain such financing. As a result of such warnings, at least one of the proposed lenders has completely withdrawn from all negotiations for the proposed financing, and TWA's efforts to obtain such financing have been handicapped.

47. In and since the month of May 1961, defendants and Atlas, with knowledge of the conspiracy and offenses hereinabove alleged, have demanded that TWA accept the proposed merger with Northeast on the terms previously directed by the defendants, which terms were and are not advantageous to TWA but which if consummated would be in the interests of the defendants and Atlas. The defend-

TWA Complaint

ants have sought the merger on such terms for the purpose of increasing their total direct and indirect stock ownership in TWA and of increasing the number of aircraft to be supplied by them to TWA, by enlarging the business of TWA.

48. The stock of TWA acquired by defendant Toolco has thus been used by the defendants since December 31, 1960 in an effort to restrain, restrict and control TWA. Despite the existence of the Voting Trust, the defendants and Atlas have attempted to require TWA to obtain aircraft exclusively from the defendants, to prevent TWA from obtaining aircraft essential to its business from Boeing, to prevent TWA from obtaining financing for the acquisition of such aircraft except on terms dictated by defendants, to require TWA to merge with another airline upon terms disadvantageous to TWA, to enlarge the defendants' indirect stock interest in TWA and to regain control over TWA and its entire business.

VIII.

Effects of Offenses

49. As the result of the offenses hereinabove alleged,

(a) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(b) Competition among aircraft manufacturers and others in the furnishing of jet-powered aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(c) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA has been restrained and monopolized.

TWA Complaint

(d) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, and between the United States and those foreign cities, between which points TWA provides the only scheduled air transportation by a United States-Flag air carrier, has been restrained and monopolized.

(e) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, between which cities TWA provides more than 60% of the scheduled air transportation provided by United States-Flag air carriers, has been restrained and monopolized.

(f) Competition among United States-Flag scheduled air carriers and among all scheduled air carriers has been, is now being and will be injured.

(g) As a result of past, present and prospective injuries to the second largest United States-Flag air carrier operating outside of the United States, the national interest of the United States has been and is being injured.

50. TWA has been immediately injured in its business by Toolco's acquisition of TWA's stock, in that TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner. TWA has further been immediately injured in its business by Toolco's denial to TWA of the authority or opportunity to acquire jet-powered aircraft from any person or corporation other

TWA Complaint

than Toolco. Unless the relief TWA requests is granted, it will suffer further and irreparable injury.

51. TWA has been further and immediately injured in its business in that defendants have supplied TWA with aircraft, including jet-powered aircraft, essential to its business upon the condition that TWA accept such financing arrangements relating to such aircraft as the defendants chose to dictate, and further in that defendants have allowed TWA to procure financing essential for the acquisition of aircraft only upon the condition that TWA would accept such aircraft as the defendants dictated, and unless the relief TWA requests is granted TWA will suffer further and irreparable injury.

52. TWA has further been injured in the following manner:

(a) TWA was prevented from obtaining jet-powered aircraft and was deprived of opportunity for adequate use of jet-powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits. That loss may be substantially increased as a result of defendants' continuing actions heretofore described.

(b) TWA was foreclosed from the opportunity for early sale of its obsolescent piston engine aircraft, causing loss to TWA.

(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced.

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(d) TWA's ability to obtain financing for its needs was substantially impaired.

(e) TWA's good will in its business of serving passengers throughout the world was diminished.

53. As additional results of the offenses hereinabove alleged, TWA further has been immediately and irreparably injured in that:

(a) TWA's ability to obtain debt and equity financing for its future financial needs has been seriously impaired.

(b) TWA's efforts to obtain both short-term and long-term financing for the purchase of the Boeing aircraft which it has contracted to buy have been seriously handicapped.

(c) TWA's ability to obtain both short-term and long-term financing for the jet-powered aircraft which it should order in the near future has been impaired.

(d) TWA's ability at this time safely to order additional jet-powered aircraft which it urgently needs has been handicapped.

(e) The date when additional jet-powered aircraft will be available to and will be in use by TWA has been deferred.

(f) The period of disruption caused by the transition from non-jet to jet operation has been extended.

(g) The coordination of the change from non-jet to jet operations has been disrupted over an extended period of time.

(h) The management and business of TWA has been disrupted over an extended period of time.

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54. As a result of the foregoing, TWA has been injured in its business and property in an amount estimated to be in excess of \$35,000,000, and which amount may become substantially greater as a result of defendants' continuing violations as heretofore described.

55. TWA has no adequate remedy at law.

SECOND CLAIM

I.

Nature of Claim and Jurisdiction of Court

56. Plaintiff's claim arises from the violations by the defendants of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In all other respects, the nature of the claim, the jurisdiction of the Court and the descriptions of the parties and of the commerce involved are as hereinbefore alleged in Paragraphs 1 through 8 hereof and such Paragraphs are hereby realleged.

II.

Offenses Charged

57. Since on or about December 31, 1960 and continuing to the date of the filing of this complaint, the defendants, Atlas and others acting for each of them have been and are now engaged in a combination and conspiracy to restrain and monopolize and an attempt to monopolize a substantial segment of the interstate and foreign commerce of the United States in violation of Sections 1 and 2 of the Sherman Act, and defendant Toolco has used the stock of TWA acquired by Toolco so as to restrain commerce and tend to create a monopoly in a line or lines of commerce in violation of Section 7 of the Clayton Act.

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58. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in Paragraph 57, was a part thereof and was done with the purpose and intent as hereinbefore alleged in Paragraph 10 hereof, and Paragraph 10 is hereby realleged.

III.

Background of the Offenses

59. Paragraphs 11 through 35 hereof are hereby realleged as the background of the offenses charged.

IV.

Acts Committed

60. Paragraphs 36 through 48 hereof are hereby realleged.

V.

Effects of Offenses

61. As results of the offenses hereinabove alleged, TWA has been immediately and irreparably injured as and in the manner hereinbefore alleged in Paragraph 53 hereof, and such Paragraph is hereby realleged.

62. If the defendants continue the offenses hereinbefore alleged and succeed in their purpose and plan, the further results and effects thereof will be those heretofore alleged as already having occurred in Paragraphs 49, 50, 51 and 53, and such results and effects are hereby realleged as prospective results and effects.

63. As a result of the offenses complained of, TWA has been injured in its business and property in a substantial

TWA Complaint

amount which cannot be accurately calculated at this time. Such damages will, as a result of the defendants' continuing violations of the antitrust laws, be substantially increased in the very near future.

64. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

THIRD CLAIM

I.

Nature of Claim and Jurisdiction of Court

65. Plaintiff's claim arises out of the facts previously alleged in support of the claims hereinbefore stated, and this Court has jurisdiction to grant all relief available under such facts since this Court has jurisdiction, as hereinbefore alleged in Paragraphs 1 and 56, to determine each of the claims hereinbefore stated and arising out of the facts alleged.

II.

Description of Parties and Background of Acts Committed

66. The description of the parties involved is as hereinbefore alleged in Paragraphs 2 through 6 hereof and the background of the acts committed is as alleged in Paragraphs 29 through 35, and such Paragraphs are hereby realleged.

III.

Acts Committed

67. From and after December 31, 1960, the defendants have maliciously and wilfully injured the business of TWA

TWA Complaint

by acts alleged in Paragraphs 37 through 48 hereof, which Paragraphs are hereby realleged.

IV.

Effects of Acts

68. TWA has been injured as and in the manner hereinbefore alleged in Paragraph 53, which Paragraph is hereby realleged.

69. TWA has been injured in the amount of approximately \$10,000,000. Such damages will, as a result of defendants' continuing wrongful acts, be substantially increased in the near future.

70. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

PRAYER

WHEREFORE, plaintiff prays that this Court order, adjudge and decree:

I.

*With Respect to the First and Second Claims
Stated Hereinbefore,*

(1) That the defendants and Atlas have violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act; and, with respect to the first claim only, Section 3 of the Clayton Act;

(2) That the defendants divest themselves of all right, title or interest in the stock of plaintiff;

TWA Complaint

(3) That the defendants pay to the plaintiff \$105,000,000, three-fold the damages sustained by plaintiff, together with costs and attorneys' fees;

(4) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be perpetually enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from acquiring or holding any interest, beneficial or otherwise, direct or indirect, in the stock of plaintiff;

(5) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be during the pendency of this suit enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, and (b) from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants; and

II.

With Respect to the Third Claim Stated Hereinbefore,

(1) That defendants pay to plaintiff compensatory damages in the amount of \$10,000,000, and such other and further punitive and exemplary damages as to this Court may seem just and proper;

TWA Complaint

(2) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be, at first during the pendency of this suit, and thereafter perpetually, enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from interfering with any contract made and entered by TWA and from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from otherwise interfering with, obstructing or harassing TWA, directly or indirectly, in any activity done by TWA pursuant to the authority vested in its officers and directors; and

III.

That the plaintiff have such other and further relief as to this Court may seem just and proper.

Dated: New York, New York,
June 30, 1961.

CAHILL, GORDON, REINDEL & OHL

By /s/ JOHN T. CAHILL
John T. Cahill, Partner

By /s/ JOHN F. SONNETT
John F. Sonnett, Partner

Attorneys for Plaintiff
80 Pine Street
New York 5, New York

A-33

**Order Referring this Action to Judge Metzner
for All Purposes, Dated August 31, 1961**

[Doc. 42]

[CAPTION]

61 Civ. 2324

The above action is hereby referred to the Honorable Charles M. Metzner, United States District Judge, for all purposes.

Dated: August 31, 1961.

/s/ SYLVESTER J. RYAN
Sylvester J. Ryan
Chief Judge

Opinion and Order of December 5, 1961

[Doc. 50]

[CAPTION]

61 Civ. 2324

METZNER, D.J.:

Plaintiff moves pursuant to Fed. R. Civ. P. 34 for the production and inspection of certain documents. Dispute exists as to the time when the documents shall be produced and as to three categories of requested documents. The first category refers to loans (item I(e)). The second category refers to balance sheets and profit and loss statements for the years 1939 through 1960 (item V(a)). The third category refers to federal income tax returns for the years 1939 to date (item V(b)).

The order of priority of deposition proceedings has already been set. Consequently, while a motion pursuant to Rule 34 may be made at any time, it does not follow that the order granting such a motion should vary previously [fol. 711] established schedules under Rule 26. *Holt v. The James Sheridan*, 12 F.R.D. 72 (S.D.N.Y. 1951); *Technical Tape Corp. v. Minnesota M. & M. Mfg. Co.*, 18 F.R.D. 318 (S.D.N.Y. 1955). The documents should be produced prior to the dates scheduled for the taking of the depositions noticed by plaintiff.

The complaint states claims of conspiracy in violation of the antitrust statutes. The scope of proof is quite broad in these cases and under the liberal federal rules wide latitude is permitted in the deposition-discovery proceedings. Rule 34 must be read in conjunction with Rule 26, which permits testimony which is "reasonably calculated to lead to the discovery of admissible evidence." The financial data sought by this motion come within the "rule of relevancy"

Opinion and Order of December 5, 1961

as applied to the allegations of the complaint. Income tax returns are not protected by privilege. *Konczakowski v. Paramount Pictures, Inc.*, 19 F.R.D. 361 (S.D.N.Y. 1956).

Defendant may request relief pursuant to Rule 30(b) upon the settlement of the order to be entered hereon.

Motion granted. Settle order.

Dated: New York, N. Y., December 5, 1961.

Charles M. Metzner, U. S. D. J.

Pretrial Order, February 7, 1962

[Doc. 59]

[CAPTION]

61 Civ. 2324

ORDER

Pretrial conferences were held in this cause on January 10, 1962 and January 23, 1962, wherein the following proceedings were had.

• • •

II.

The deposition of the plaintiff by Charles C. Tillinghast, Jr., shall be continued and the depositions of the other witnesses shall be commenced in accordance with the schedule annexed hereto. The Special Master hereinafter appointed may vary this schedule upon application of either party if in his opinion the circumstances require such variance.

III.

Upon the consent of counsel for the plaintiff and the defendant Hughes Tool Company, the Court was empowered to appoint a Special Master. J. LEE RANKIN, Esq., of 36 West 44th Street, New York 36, New York is hereby appointed Special Master to act in connection with the depositions and other discovery proceedings undertaken by any person now a party or any person who may hereinafter become a party, with the following powers: to preside over and supervise the conduct of depositions and in connection therewith to rule on such objections to questions, whether heretofore made or to be made, as have not been reserved by stipulation of the parties to the time of trial; to rule

Pretrial Order, February 7, 1962

on objections, whether heretofore made or to be made, with respect to the production of documents; to make any and all other rulings which may be required pursuant to the provisions of Rules 26 to 37, and 45, of the Federal Rules of Civil Procedure and such other rules as may from time to time become applicable.

IV.

Any action taken or ruling made by said Special Master shall be subject to review by the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, upon timely application with reasonable notice.

V.

The Special Master shall be reimbursed for such expenses as are reasonably and necessarily incurred by him and the compensation of the Special Master is to be fixed at \$60.00 per hour. Such reimbursement and compensation are to be taxed as costs at the conclusion of this action; provided, however, that until the taxation of costs the compensation of the Special Master is to be paid at monthly intervals, fifty per cent (50%) by plaintiff Trans World Airlines, Inc., and fifty per cent (50%) by defendant Hughes Tool Company, and provided, further, that such payments shall be subject to reallocation among any additional parties who may hereafter be joined and who may participate in the depositions.

VI.

Defendant Hughes Tool Company shall file its answer to the complaint herein upon the day following the completion, in accordance with the annexed schedule, of the deposition of plaintiff by Charles C. Tillinghast, Jr., Robert W. Rummel and E. O. Cocke.

Pretrial Order, February 7, 1962

VII.

The deposition of plaintiff by A. V. Leslie, in view of his present illness, is adjourned without date and shall be re-scheduled by the Special Master upon reasonable notice by the defendant at an appropriate time in light of the health of the witness and at a date not in conflict with the annexed schedule.

VIII.

Any request for a change in the date fixed for the production of writings and other material by the defendant Hughes Tool Company, presently set for March 15, 1962 by order of this Court dated December 18, 1961, shall be made to the Special Master.

So ORDERED.

Dated: New York N. Y.
February 7, 1962

/s/ CHARLES M. METZNER
Charles M. Metzner

U. S. D. J.

Pretrial Order, February 7, 1962

SCHEDULE OF DEPOSITIONS

I.

Depositions Noticed by Defendant Hughes Tool Company

Date	Deponent	Time and Location of Depositions
13, 1962	Trans World Airlines, Inc. By: Charles C. Tillinghast, Jr. R. W. Rummel E. O. Cocke	10 a.m. 80 Pine St. New York, N. Y.
20, 1962	Charles Thomas	10 a.m. The Irvine Ranch 13042 Myford Rd. Tustin, Calif.
21, 1962	Bank of America By: Keith Carver Robert Gordon	10 a.m. Clerk's Office U. S. Court House Los Angeles, Calif.
27, 1962	Bankers Trust Company By: E. F. Ebert	10 a.m., Room 3113 120 Broadway New York, N. Y.
27, 1962	Morgan Guaranty Trust Co. of New York By: John Schroeder	2 p.m., Room 3113 120 Broadway New York, N. Y.
28, 1962	The Mellon Bank By: Frederick Gwinner Ralph Ehler	10 a.m. Clerk's Office U.S. District Court Pittsburgh, Pa.
1, 1962	Ben-Fleming Sessel Robert A. Kerr Irving Trust Company By: Ben-Fleming Sessel Robert A. Kerr	10 a.m., Room 3113 120 Broadway New York, N. Y.
8, 1962	Frederic H. Brandi Arthur L. Wadsworth Dillon, Read & Co., Inc. By: Frederic H. Brandi Arthur L. Wadsworth	10 a.m., Room 3113 120 Broadway New York, N. Y.
15, 1962	James F. Oates, Jr. Grant Keehn Equitable Life Assurance Society of the United States By: James F. Oates, Jr. Grant Keehn	10 a.m., Room 3113 120 Broadway New York, N. Y.
15, 1962	Warner Mendel	10 a.m., Room 3113 120 Broadway New York, N. Y.

Pretrial Order, February 7, 1962

Date	Deponent	Time and Location of Deposition
Mar. 23, 1962	Harry C. Hagerty Gordon P. Jenkins Metropolitan Life Insurance Company By: Harry C. Hagerty Gordon P. Jenkins	10 a.m., Room 311 120 Broadway New York, N. Y.
Mar. 29, 1962	Irving S. Olds	10 a.m., Room 311 120 Broadway New York, N. Y.
Apr. 5, 1962	Ernest R. Breech	10 a.m., Room 311 120 Broadway New York, N. Y.
Apr. 12, 1962	Boeing Company By: William M. Allen J. O. Yeasting	10 a.m. Clerk's Office U.S. District Court Seattle, Wash.
Apr. 19, 1962	Prudential Insurance Company of America By: Monroe Chapplear	10 a.m., Room 311 120 Broadway New York, N. Y.

II.

Depositions Noticed by Plaintiff
Trans World Airlines, Inc.

Apr. 23, 1962	Howard R. Hughes	10 a.m. Beverly Hills Hotel Beverly Hills, Cal.
May 8, 1962	Hughes Tool Company By: Raymond Holliday	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 16, 1962	Hughes Tool Company By: M. E. Montrose	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 22, 1962	Hughes Tool Company By: C. H. Price	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 25, 1962	Hughes Tool Company By: C. S. Johnson	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 31, 1962	Hughes Tool Company By: H. E. Rogers	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
June 4, 1962	Hughes Tool Company By: C. Collier	10 a.m., 18th Floor 80 Pine Street New York, N. Y.

Toolco's Answer and Counterclaims

[Doc. 63]

[CAPTION]

61 Civ. 2324

Defendant Hughes Tool Company (hereinafter "Toolco") for its answer to the complaint and for its counterclaim herein states:

Answering the First Claim for Relief

1. Toolco denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.

2. Toolco admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.

3. Toolco admits that it is a corporation organized and existing under the laws of the State of Delaware and that it has assets of several hundred million dollars and except as so admitted denies each and every allegation of paragraph 3 of the complaint.

4. Toolco admits that Howard R. Hughes (hereinafter "Hughes") has been its sole stockholder from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.

5. Toolco admits that Raymond M. Holliday has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

Toolco's Answer and Counterclaims

6. Toolco admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of \$100,000,000, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of \$300,000,000 and net income after taxes in excess of \$6,000,000, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

7. Toolco admits that commencing in or about the year 1939 and at various times thereafter it acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Toolco admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Toolco admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas")), had prepared to the general knowledge of the air carrier industry plans and drawings and otherwise

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had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Toolco admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design stage and was terminated in 1955 by General Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Toolco admits that prior to May 1, 1956, it considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it would furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

13. Toolco admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight

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Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Toolco admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each and every allegation of paragraph 18 of the complaint.

15. Toolco admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Toolco admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years, and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Toolco admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air car-

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rier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded \$35,000,000, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

19. Toolco admits that subsequent to 1955 it discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Toolco admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35 of the complaint.

22. Toolco admits that on or about May 31, 1961, it sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Toolco admits that TWA requested the Securities and Exchange Commission to accelerate the effective date

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of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Toolco admits that pursuant to the direction of the Securities and Exchange Commission its counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under conditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments incurred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Toolco admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

*Toolco's Answer and Counterclaims**Answering the Second Claim for Relief*

26. Toolco denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

Answering the Third Claim for Relief

27. Toolco denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

AS A FIRST AND COMPLETE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

28. The complaint, and each of the claims for relief alleged therein, fail to state a claim upon which relief can be granted.

AS A SECOND AND COMPLETE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

29. The alleged facts set forth in the complaint do not constitute violations by Toolco of Section 1 of the Sherman Act (15 U. S. C. § 1 (1958)), of Section 2 of the Sherman Act (15 U. S. C. § 2 (1958)), of Section 3 of the Clayton Act (15 U. S. C. § 11 (1958)), or Section 7 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 18 (1946 Ed.)), and since

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plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the action and over each of the claims for relief alleged in the complaint.

AS AND FOR A THIRD AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

30. Since both Toolco and TWA are Delaware corporations, the jurisdiction of this Court, if any, depends upon the alleged violations of the antitrust laws contained in plaintiff TWA's complaint.

31. Toolco is a corporation primarily engaged in the manufacture and sale of equipment for the oil well drilling industry. It has at no time manufactured commercial transports and its sole activities with respect to the sale or lease of aircraft to commercial airlines (except for the sale of two DC-6 aircraft originally acquired by Toolco for its own use) have arisen from its efforts to assist TWA in obtaining flight equipment adequate to its needs. It has at no time been in the business of selling or leasing any flight equipment to any airline and the only occasions on which it has made equipment ordered by it available to any airline other than TWA have been when certain equipment ordered for the use and benefit of TWA has proved to be in excess of the needs or capabilities of TWA.

32. Toolco first acquired an interest in TWA in 1939 when the airline industry was in its infancy. By the end of 1942 it had acquired approximately 45% of the total outstanding shares of TWA. Thereafter, it acquired additional shares of TWA until it had acquired more than 78% of said shares.

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33. The control of TWA by Toolco and the acquisition of more than 78% of the common stock of TWA by Toolco were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "the Board") under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Section 414 of the Federal Aviation Act of 1958 (49 U. S. C. § 1384) exempts and relieves any person affected by any such order from the operation of the anti-trust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may be necessary to enable such person to do anything authorized, approved or required by such order.

34. The initial acquisition of a controlling interest in TWA by Toolco was approved by the Board, under Section 408 of the Civil Aeronautics Act of 1938, as consistent with the public interest, in an opinion and order dated October 17, 1944. Said order provided that such approval would be effective so long as commercial transactions between TWA and Toolco were limited to those involving complete items of property the price of which did not exceed \$200 each, with the further limitation that the total annual expenditures involved in such commercial transactions by either party should not exceed \$10,000.

35. In 1950 the Board approved under said Section 408 the further acquisition of control of TWA by Toolco subject to the same conditions contained in the aforesaid 1944 order. In so doing, the Board approved the exercise by Toolco of complete control over the business and affairs of TWA, including equipment and financing, and found that the continuing interest of Toolco in TWA appeared essential to the best interest of the carrier and the public.

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36. Since the date of the Board's 1944 order no commercial transactions between Toolco and TWA have taken place except as authorized by said order or except after a modification of said order upon a finding by the Board under said Section 408 that the proposed transaction was consistent with the public interest.

37. Toolco from the time of its initial acquisition of an interest in TWA has on various occasions assisted TWA in acquiring flight equipment adequate to its needs and in financing such flight equipment. TWA also acquired flight equipment directly from various manufacturers without assistance from Toolco. Orders of the Board specifically approved as not inconsistent with the public interest all transactions between TWA and Toolco with respect to the acquisition or financing of flight equipment.

38. The complaint does not allege any violation of the Federal Aviation Act of 1958 or of the orders of the Board under Section 408 thereof.

39. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was, however, within the contemplation of the Board in approving control of TWA by Toolco. The merger proposal was, moreover, specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

40. In December, 1960, as a result of the demands and unlawful activities of certain lending institutions and

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others, Toolco was compelled to place in a voting trust the shares of common stock of TWA which it owned. By reason of such voting trust Toolco no longer controls TWA. All of the activities of Toolco alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Toolco solely for the purpose of protecting Toolco's interests as beneficiary under said voting trust and as equitable owner of more than 78% of the stock of TWA.

41. By reason of the facts herein alleged, this Court lacks jurisdiction of the subject matter of the complaint and over the subject matter of each alleged claim for relief contained therein.

AS AND FOR A FIRST COUNTERCLAIM AGAINST TWA AND AGAINST ADDITIONAL DEFENDANTS THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., ERNEST R. BREECH AND CHARLES C. TILLINGHAST, JR.

42. Toolco is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Houston, Texas. All of its common stock is owned by Hughes, a leading aviator and aeronautical engineer who for many years has been interested in the development of commercial aviation in the United States.

43. Plaintiff TWA is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices in the City of New York. TWA is and for many years has been the country's third largest domestic and second largest international air carrier. At all times hereinafter mentioned from 1947 to December,

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1960, Toolco owned a majority of TWA's capital stock and nominated a majority of TWA's directors. Since December, 1960 Toolco has been the equitable owner of in excess of 78% of the capital stock of TWA which stock was placed in a voting trust in December, 1960.

44. Additional defendants The Equitable Life Assurance Society of the United States (hereinafter "Equitable") and Metropolitan Life Insurance Company (hereinafter "Metropolitan") are corporations organized and existing under the laws of the State of New York with their principal places of business in the City of New York. Metropolitan is the country's largest insurance company with admitted assets of approximately \$17 billion. Equitable is the country's third largest insurance company with admitted assets of approximately \$10 billion. From 1947 to December, 1960 Equitable was the sole holder of TWA's senior indebtedness other than bank debt. At all times since December, 1960 Equitable and Metropolitan have been the holders of all such senior indebtedness of TWA.

45. Additional defendant Irving Trust Company (hereinafter "Irving") is a trust company organized and existing under the banking laws of the State of New York with its principal place of business in the City of New York. Irving is and for many years has been one of TWA's principal commercial bankers, has made loans and participated with other lending institutions in making loans to TWA and has undertaken on behalf of TWA to bring together lending institutions for the purpose of participating in loans to TWA. Irving for many years prior to 1961 maintained a similar banking relationship with Toolco.

46. Additional defendant Ernest R. Breech (hereinafter "Breech") is, upon information and belief, a citizen of the

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State of Michigan. From December, 1960, until his resignation on or about January 26, 1962, he was one of the two voting trustees selected by Equitable and Metropolitan with respect to 5,221,301 shares of TWA's capital stock owned by Toolco which were placed in a voting trust in December 1960. Breech is and at all times since April 27, 1961 has been the Chairman of the Board of Directors of TWA.

47. Additional defendant Charles C. Tillinghast, Jr. (hereinafter "Tillinghast"), a citizen of the State of New York, is and at all times hereinafter mentioned since April 17, 1961, has been the president and chief executive officer of TWA.

48. Additional defendant Dillon, Read & Co. Inc. (hereinafter "Dillon Read"), on information and belief, is a corporation organized and existing under the laws of the State of New York with its principal place of business in the City of New York. Dillon Read is engaged in the investment banking business and is and since early 1959 has been the principal financial adviser to TWA.

49. This counterclaim is asserted pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and arises out of the subject matter of TWA's claims herein.

50. In 1960 Equitable and Metropolitan, together with a group of commercial banks headed by Irving, demanded as a condition to their providing any financing to TWA that Toolco place in a lender-controlled voting trust prior to any default all shares of TWA stock which it owned. Such financing was required by TWA in order for it to acquire jet aircraft theretofore ordered by Toolco for the benefit of TWA. In order to insure that such needed jet equipment would be acquired by TWA and for reasons which included the difficulty, if not impossibility, of obtaining such financing elsewhere, Toolco was compelled to yield to such

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demands but only upon the express agreement and understanding that:

(a) The Voting Trust would terminate upon the repayment of the obligations in connection with which it was created; and

(b) Toolco would have the right to terminate the Voting Trust by purchasing all such obligations at the principal amount thereof together with accrued interest and, in addition, by paying to Metropolitan and Equitable a premium to be initially 22% of the principal amount of such obligations acquired by them.

51. Thereafter, in December 1960, pursuant to the aforesaid agreement Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions for the financing of the acquisition of the jet flight equipment ordered by Toolco for the benefit of TWA. In connection therewith and the purchase by Equitable and Metropolitan of \$92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972 (hereinafter the "Series A Sinking Fund Notes") and the borrowing by TWA of \$72,800,000 from banks headed by Irving, which borrowing was evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964 (hereinafter the "Series A Serial Notes"), Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions and agreements by which the 5,221,301 shares of TWA's common stock were placed in the Voting Trust and Metropolitan and Equitable designated Breech and Irving S. Olds as two of the three voting trustees with respect to said stock. By the terms of said agreements:

(a) Metropolitan and Equitable, as the holders of a majority in principal amount of the Series A Sinking Fund Notes and Series A Serial Notes,

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acting through Irving as agent for the lenders, have, and at all times since December, 1960, have had, the absolute right and power to remove the two lender-named voting trustees, or either of them, and to designate and remove from time to time the successor of either of said voting trustees.

(b) The Voting Trust is to continue, as to all shares of TWA beneficially owned by Toolco, for a period of 10 years from its inception, unless sooner terminated in accordance with the terms of said agreements; and Toolco covenanted, so long as it should be the owner of any voting trust certificates, further to extend the Voting Trust, at the request of Irving as agent, for such additional period not exceeding the maximum period then permitted by the law of Delaware as should be specified in such request.

(c) The Voting Trust shall terminate (i) upon consent of Irving as agent acting at the direction of the holders of a majority in amount of the Series A Serial Notes and Series A Sinking Fund Notes, or (ii) upon cancellation and discharge of the Indenture of Mortgage securing said Notes, i.e., upon the payment or prepayment of said Notes, or (iii) upon the exercise by Toolco of an option to purchase, after December 31, 1961, all but not less than all of the Series A Sinking Fund Notes and Series A Serial Notes at a price equal to the principal amount thereof plus accrued interest and, in addition thereto, a premium which is initially 22% of the principal amount of the Series A Sinking Fund Notes, namely, \$20,416,000.

52. By reason of the agreements and transactions entered into in December, 1960, and the Voting Trust then created, Equitable and Metropolitan, together with other lending institutions including Irving, acquired and now possess control over the business and affairs of TWA. They have the right and power at any time to remove and

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select a successor to either or both of the voting trustees whom they have chosen. The majority voting trustees who are thus subject to their control in turn have the absolute right and power under the by-laws of TWA at any time to reconstitute TWA's Board of Directors without cause by altering the number of directors, by removing the entire Board of Directors at will, and subject to certain qualifications, by removing one or more directors.. The majority voting trustees have used the power so given to them to reconstitute TWA's Board of Directors and the members of said Board of Directors as presently constituted have been chosen in accordance with the wishes and with the approval of Metropolitan and Equitable.

53. Since the creation of the Voting Trust and the reconstitution of TWA's Board of Directors, TWA, Breech, Tillinghast, Irving, Metropolitan, Equitable and Dillon Read entered upon a course of conduct designed and calculated to prevent Toolco from regaining control of TWA, to perpetuate the Voting Trust and to interfere with the right of Toolco to terminate the Voting Trust in accordance with the rights of Toolco to terminate the Voting Trust in accordance with the terms of the agreements made in December 1960. Among the actions taken in furtherance of these objectives were the following:

(a) In or about March, 1961, Breech selected Tillinghast to be TWA's president and chief executive officer. Prior to his selection Tillinghast had had no experience in the airline industry but he had acted as counsel for a corporation of which Breech was the chief executive officer. Upon information and belief, prior to his acceptance of the presidency of TWA, Tillinghast consulted with Breech and thereafter with representatives of Equitable, Metropolitan and Irving as to steps which could be taken

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to make it impossible for Toolco to terminate the Voting Trust and regain control of TWA in the foreseeable future and Dillon Read participated in conversations and suggestions as to how Tillinghast could be satisfied that Toolco would be unable to terminate the Voting Trust.

(b) Thereafter, TWA entered into an employment contract with Tillinghast pursuant to recommendations made by Breech. This contract provides that Tillinghast will be employed as TWA's chief executive officer for a minimum of five years upon terms such that upon his retirement or discharge at any time following the termination of the Voting Trust (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of \$50,000 per year until he reaches age 65 and \$30,000 per year thereafter. Tillinghast is now 50.

(c) Shortly after Tillinghast's election as president, TWA entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing although, upon information and belief, the number of such aircraft which TWA agreed to acquire is in excess of TWA's needs and financial capabilities. The aggregate cost of such jet aircraft and related equipment is in excess of \$187,500,000. In order to finance such purchases, TWA through Dillon Read proposed to enter into agreements with Metropolitan, Equitable and the banking group headed by Irving to supply an additional \$147,000,000 of senior debt. Metropolitan, Equitable and Irving agreed to supply such financing only upon terms designed and calculated to perpetuate the Voting Trust and to preclude Toolco from regaining control of

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TWA in accordance with the agreements made in December, 1960.

(d) In May 1961, Toolco learned of such proposed action between TWA and the lending institutions which control TWA. Toolco notified TWA, the voting trustees and the lending institutions of its concern at the self-dealing implicit in such negotiations. Toolco requested that it be informed as to the details of the contemplated financing of the Boeing purchases. TWA refused to furnish such information to it.

(e) Thereafter, in August 1961, TWA, upon information and belief, entered into agreements with Metropolitan and Equitable and with Irving and its associated banks, by the terms of which:

(i) TWA agreed to sell and Equitable and Metropolitan agreed to purchase, subject to certain conditions, an aggregate of \$107,000,000 principal amount of additional sinking fund notes bearing interest at 6% and maturing on December 1, 1977 (hereinafter the "Series B Sinking Fund Notes");

(ii) Irving and the banking group which it headed agreed to lend to TWA, subject to certain conditions, an additional \$40,000,000 to be evidenced by additional serial notes bearing interest at 5½% and maturing serially from December 31, 1963 through December 31, 1966 (hereinafter the Series B Serial Notes);

(iii) As required by its agreements with Metropolitan, with Equitable and with Irving and its

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associated banks, TWA entered into a supplemental indenture by the terms of which the holders of a majority in principal amount of the Series B Sinking Fund Notes and Series B Serial Notes, namely, Metropolitan and Equitable, may demand payment from TWA of the principal of all said Notes (\$147,000,000) together with accrued interest upon the happening of any of the following events, whether or not such events have come about or been effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body:

(a) the Voting Trust agreement shall have terminated for any reason whatsoever other than a termination by Irving as agent, prior to the payment in full of all the outstanding Series A Sinking Fund Notes and Series A Serial Notes at the voluntary request of the holders (other than Toolco or a Toolco affiliate) of a majority in amount of such outstanding Notes;

(b) the rights of the holders (other than Toolco or affiliates of Toolco) of a majority of the outstanding Series A Sinking Fund Notes and Series A Serial Notes, acting through Irving as agent, to remove and fill vacancies in the office of the two voting trustees appointed by Irving as agent shall have terminated for any reason whatsoever other than a termination by the voluntary action of such holders of a majority of the Series A Sinking Fund Notes and Series A Serial Notes; or

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(c) all the outstanding Series A Sinking Fund Notes and Series A Serial Notes shall be owned by Toolco or by any affiliate of Toolco, or by Toolco and any affiliate of Toolco.

Neither TWA nor any of the lending institutions sought or obtained the consent of Toolco to such agreements.

54. The employment contract between Tillinghast and TWA in so far as it requires TWA to pay to Tillinghast an annuity upon the termination of the Voting Trust whether or not in accordance with its terms is without consideration and represents a waste of the corporate assets of TWA.

55. The supplemental indenture into which TWA entered in August 1961, in so far as it permits the accelerations of the maturity of the Series B Sinking Fund Notes and the Series B Serial Notes constituted and constitutes unjustified self-dealing between TWA and those now in control of TWA, was and is contrary to and in violation of the agreements or obligations of TWA, Metropolitan, Equitable and Irving made or incurred at and prior to the time the Voting Trust was created and constituted and constitutes an unjustifiable interference with the rights of Toolco to effect the termination of the Voting Trust in accordance with said agreements. In connection with TWA's 1961 financing Dillon Read, upon information and belief, received substantial payments, the exact amount of which is presently unknown to Toolco.

56. Upon information and belief, TWA, Breech, Tillinghast, Metropolitan, Equitable and Dillon Read will, unless enjoined by this Court, continue to engage in a course of conduct designed and calculated to perpetuate the Voting Trust, to prevent its termination in accordance with its

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terms and to perpetuate the control of Metropolitan and Equitable and of Breech and Tillinghast over the business and affairs of TWA.

57. Additional defendants Breech, Tillinghast, Metropolitan, Equitable, Irving and Dillon Read are necessary parties in order that complete relief may be granted to Toolco.

58. By reason of the foregoing Toolco has suffered substantial damages and is threatened with irreparable injury.

59. Toolco has no adequate remedy at law.

AS AND FOR A SECOND COUNTERCLAIM AGAINST TWA AND AGAINST ADDITIONAL DEFENDANTS METROPOLITAN, EQUITABLE AND IRVING

60. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, and 50 through 56, inclusive, hereof.

61. Jurisdiction of this Court arises from the violations of Section 408 of the Federal Aviation Act of 1958 (49 U. S. C. § 1378) herein alleged. Said Section 408 makes it unlawful for any person engaged in any phase of aeronautics to acquire control of any air carrier in any manner whatsoever unless such acquisition of control is approved by the Board and further makes it unlawful for any such person to continue to maintain control of any air carrier which has been acquired in violation of said Section 408.

62. At all time since 1955 Metropolitan and Equitable have been and are now persons engaged in a phase of aeronautics within the meaning of said Section 408 by reason of activities which include the following:

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(a) Upon information and belief, at all times since 1955 the major airlines of the United States have been and are now dependent upon Equitable, Metropolitan and Prudential Life Insurance Company of America (hereinafter "Prudential"), the country's second largest insurance company, for long-term senior financing and said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. This dominance has arisen in part from the historic interest of said insurance companies in airline financing, in part from the recognition and enforcement of the traditional lender concept and in part from the vast amounts of financing required by the major airlines, particularly in connection with the acquisition of jet flight equipment. Upon information and belief, since 1955 none of the country's five largest air carriers have arranged any senior financing other than bank financing without the participation therein of one or more of said three insurance companies.

(b) Metropolitan is, and, upon information and belief, for many years has been, the country's largest supplier of financing to air carriers. As at December 31, 1960 it held obligations of said carriers in a principal amount in excess of \$288 million. Included in such obligations were those of four of the country's five largest air carriers, including TWA.

(c) Equitable is, and, upon information and belief, for many years has been, the country's third largest supplier of financing to air carriers. As at December 31, 1960 it held obligations of said carriers in a principal amount in excess of \$188 million, including obligations of TWA.

(d) As at December 31, 1960, Metropolitan held senior obligations of air carriers other than TWA in a principal amount in excess of \$250 million and

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Equitable held such obligations in a principal amount in excess of \$144 million.

(e) As at December 31, 1960, Metropolitan held in excess of 46% and Equitable in excess of 28% of the senior long-term debt of the country's five largest air carriers.

63. In December 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and Equitable have continued to maintain and perpetuate their control of TWA without Board approval.

64. As more fully alleged in paragraph 53 hereof, in August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply to TWA an additional \$147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable.

65. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termination of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

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66. TWA, Equitable, Metropolitan and Irving are necessary parties to this second counterclaim in order that Toolco may be afforded full and proper relief hereunder.

67. Toolco has no adequate remedy at law.

**AS AND FOR A THIRD COUNTERCLAIM AGAINST TWA AND
AGAINST ALL ADDITIONAL DEFENDANTS**

68. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 50 through 55, inclusive, and 62 hereof.

69. Upon information and belief, additional defendants James F. Oates, Jr. (hereinafter "Oates") and Harry C. Hagerty (hereinafter "Hagerty") are citizens of the State of New York; Oates is, and at all times hereinafter mentioned since 1955 has been, the president of Equitable and is and has been since said date in a position to determine or influence its lending policies; Hagerty at all times hereinafter mentioned since 1955 until December 31, 1961 was the Vice Chairman of the Board of Directors of Metropolitan and was during such period in a position to determine or influence its lending policies.

70. Additional defendant Ben-Fleming Sessel (hereinafter "Sessel") is a citizen of the State of Connecticut. He is, and at all times hereinafter mentioned since 1955, has been the Senior Vice President of Irving and a director of TWA. He was originally nominated as a director of TWA by Toolco.

71. Toolco asserts this counterclaim derivatively in the right of TWA and its stockholders. It has made no demand upon the directors or the stockholders of TWA to bring this claim for the reasons that the directors are under the domination and control of the additional defendants, that more

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than 78.2% of the stock of TWA is held in the Voting Trust, that a majority of the voting trustees of such stock are subject to the control of the additional defendants and that demand would be futile.

72. Jurisdiction of this Court over this counterclaim arises from the violations by the additional defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and of Section 7 of the Clayton Act (15 U.S.C. § 18) herein-after alleged.

73. The trade or commerce among the several States which is the subject matter of this counterclaim includes:

(a) The furnishing in interstate commerce by lending institutions of senior financing to the major airlines of the United States; and

(b) The furnishing in interstate commerce by lending institutions of senior long-term financing to the major airlines of the United States.

74. The requirements of the major airlines for senior financing constitute and have constituted a separate and distinct market for lending institutions for reasons which include the following:

(a) The large amounts of moneys required;

(b) The large amounts of moneys required at a particular time; and

(c) The nature of the security for such financings, namely, jet and other aircraft which have a limited useful life and which may become obsolete in a relatively few years.

75. The requirements of the major airlines for long-term senior financing constitute and have constituted a separate and distinct market from the total requirements of

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the major airlines for senior financing for the reason that banking institutions which have furnished a substantial portion of the senior short-term financing do not act as suppliers of long-term financing. As used herein, the term "long-term financing" means debt financing maturing more than five years from its creation and the term "short-term financing" means debt financing maturing within five years of its creation.

76. TWA constitutes and has constituted a substantial proportion of the market for the supplying of long-term and short-term financing to the major airlines of the United States. For example, in 1960 Equitable and Metropolitan supplied to TWA \$92.8 million in long-term financing and Irving and a banking group which it headed supplied \$72.2 million in short-term financing and in 1961 TWA agreed to sell to Metropolitan and Equitable, and Metropolitan and Equitable agreed to purchase, an additional \$107 million of long-term debt securities and Irving and, with one exception, the same banking group agreed to lend on a short-term basis an additional \$40 million.

77. The violations of the antitrust laws hereinafter more fully alleged include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing, all in violation of Section 1 of the Sherman Act.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment

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of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States, all in violation of Section 2 of the Sherman Act.

(c) An agreement in restraint of interstate trade and commerce of the United States, to refuse to supply financing to TWA or Toolco so long as TWA was, is or shall be controlled by Toolco, all in violation of Section 1 of the Sherman Act.

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions, all in violation of Section 1 of the Sherman Act.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would supply financing to that airline upon any terms, all in violation of Section 1 of the Sherman Act.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA, in violation of Section 7 of the Clayton Act.

(g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except

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upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust, all in violation of Section 1 of the Sherman Act.

78. During the period from 1939 through 1955, Toolco through the use of its credit and resources, from time to time assisted TWA in the acquisition of piston-engined aircraft which TWA did not have the financial resources to acquire but which were necessary to enable TWA to maintain its competitive position on its authorized routes and to expand its operations pursuant to new authorizations of additional routes. In 1955 TWA and Toolco recognized that in order for TWA to maintain its competitive position it would require a fleet of jet-powered aircraft substantially as soon as its principal competitors and that orders for such equipment should not be delayed. TWA did not and would not have the financial resources or credit to order any jet aircraft prior to the end of 1958 at the earliest. Toolco, therefore, in 1956, in accordance with practices previously followed when the acquisition of needed aircraft was beyond TWA's then capabilities, used its own credit and resources to place orders for the acquisition of a fleet of jet aircraft from Boeing and General Dynamics for use by TWA. Prior to the execution of these contracts the type of equipment, the form of the contracts and the specifications of the aircraft were approved in detail by the operating and engineering personnel of TWA; and thereafter TWA's representatives supervised their manufacture, testing and delivery.

79. Toolco's total commitments in connection with TWA's jet equipment program exceeded \$300 million.

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Toolco and TWA recognized that even if Toolco had desired to do so, it could not supply permanent financing for such a fleet. By reason of the vast amount of financing required, such permanent financing could be accomplished only with the participation of one or more principal suppliers of long-term financing to the major airlines, namely Equitable, Metropolitan and Prudential.

80. By 1956 Equitable had established itself as TWA's traditional senior lender, holding \$40 million in principal amount of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds (hereinafter "the Sinking Fund Bonds") due December 1, 1969. Upon information and belief, prior to 1956, lending institutions, including Metropolitan, Equitable and Prudential, entered into an understanding and agreement that (i) none of such lending institutions would supply financing to an airline except with the consent of the traditional senior lender to that airline and (ii) if the traditional senior lender to an airline refused to supply such financing except upon particular terms none of such lending institutions would supply financing on any terms. By reason of such agreement and understanding, Equitable's position as traditional senior lender to TWA made Equitable's support a necessity if the permanent financing of TWA's jet equipment program were to be accomplished.

81. Toolco discussed with Equitable in 1958 Equitable's requirements as to the permanent financing of TWA's jet equipment program. In such discussions Equitable indicated that:

(a) Since in Equitable's view, TWA's financial condition had not improved sufficiently so that TWA could independently finance the required jet fleet,

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Toolco would either have to supply a substantial portion of such financing itself or be responsible for the obligations incurred by TWA;

(b) Equitable would require that as a condition to its participation in any TWA financing Toolco agree that Toolco's stock interest in TWA would be placed in a lender-controlled voting trust but only in the event of a default by TWA; and

(c) As a part of any financing TWA's Sinking Fund Bonds which Equitable held would have to be refunded.

82. The discussions with Equitable during 1958 were unsatisfactory to Toolco, primarily because Equitable did not appear prepared to participate in financing TWA's jet program unless Toolco assumed substantial permanent obligations. In early 1959 Dillon Read was retained to prepare plans for the permanent financing of TWA's jet equipment program. Dillon Read advised Toolco and TWA that since Equitable was TWA's traditional senior lender, Equitable's support and participation was essential to the development of any permanent financing. Dillon Read further advised Toolco and TWA that under prevailing conditions an offering of equity securities by TWA would be inadvisable.

83. In view of the apparent difficulties to independent financing by TWA, Toolco, in cooperation with TWA, developed a plan for permanent financing through a leasing arrangement. Dillon Read undertook to and did develop a proposal for such an arrangement on terms which they presented as advantageous to TWA. TWA did not accept this proposal since Equitable would not support such a leasing plan.

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84. Toolco had reason to believe that the public acceptance of jet aircraft and the consequent improvement in the earnings of TWA would place TWA in a position independently to finance its jet equipment program. Early in 1959 Boeing commenced the delivery of jet aircraft ordered by Toolco. As such aircraft were received, they were placed in service by TWA under temporary leases pending permanent financing by TWA. TWA was thus enabled to place jet aircraft in transcontinental service substantially at the same time as one of its principal domestic competitors and considerably in advance of its other principal domestic competitor. After this early introduction of jet equipment TWA realized earnings before taxes in excess of \$17.4 million in 1959 and in excess of \$15.2 million in 1960.

85. Toolco financed the acquisition of jet aircraft leased to TWA out of its own cash resources until they were all but exhausted. Thereafter, such jet aircraft were financed largely through loans from Irving, TWA's and Toolco's lead bank, and other banks. Such loans were made available to Toolco until early in 1960. Although Irving informed Toolco in 1959 that it had exhausted its legal loan limit, its consents to subsequent loans continued to be required by reason of the terms of its existing loans. In 1959 Toolco advised Irving that such interim credit should not be terminated without giving Toolco adequate lead time either to arrange other interim credit or to consummate a plan for the permanent financing of TWA.

86. Upon information and belief, at some time in or about March 1960, the exact time being unknown to Toolco, Equitable, Irving and other lending institutions, Dillon Read and Oates, Sessel and others entered into an under-

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standing and conspiracy (the persons who either at its inception or from time to time thereafter joined such conspiracy being hereinafter called "the conspirators") to the following effect:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA except after its acceptance of such predetermined interest rates.

In furtherance of said conspiracy and pursuant to said understanding the conspirators took the actions hereinafter set forth.

87. Following the refusal of Equitable to support a leasing plan, Toolco with the knowledge and assistance of TWA entered into negotiations with aircraft manufacturers for assistance in the financing of not only TWA's then

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planned jet fleet but also of additions thereto. Irving learned of such negotiations early in 1960. Thereafter, Irving and other banks which had advanced money to Toolco, without prior notice to Toolco, advised Toolco on March 5, 1960 that they would no longer supply any short-term credit for the purpose of paying for further deliveries of jet equipment for TWA. The payment of rentals due from TWA to Toolco under the leases of jet aircraft by Toolco to TWA would have provided at least a partial alternative source of moneys to Toolco to be used in making payments for jets thereafter to be delivered. Equitable refused to permit TWA to make any such payments.

88. In March 1960, TWA and Toolco agreed to support a plan, later known as the "Dillon Read Plan", which contemplated that Equitable and one or more other insurance companies would supply permanent senior long-term financing, Irving and associated banks would supply short-term and interim senior financing to TWA and Toolco would accept \$100 million of subordinated debt of TWA in payment, *pro tanto*, of TWA's obligations to Toolco and also establish a revolving credit in favor of TWA in the amount of \$50 million. Equitable agreed to participate in such financing but only on condition that Toolco and TWA agree:

(a) To the acceleration of the maturity of \$31,000,000 principal amount of TWA's Sinking Fund Bonds due in 1969 held by Equitable so that such bonds would mature at the same time as the interim bank debt and to an increase in the interest rate on the Sinking Fund Bonds to that on the interim bank debt;

(b) To a guarantee by Toolco of the payment of said Bonds;

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(c) To the interest rate for the permanent financing supplied by the insurance companies being one-half of 1% greater than for the bank financing; and

(d) To the execution of an agreement which would provide that in the event of certain defaults, including a default as a result of a change of management, the TWA stock owned by Toolco would be placed in a voting trust controlled by the lenders.

Dillon Read advised Toolco that no alternative to the acceptance of the Dillon Read Plan and the requirements of Equitable appeared feasible. Relying upon this advice Toolco on or about March 28, 1960, agreed to accept said Plan and requirements.

89. Thereupon Irving on behalf of TWA undertook to form a banking group for the purpose of providing interim and short-term financing to TWA. Prior to Toolco's acceptance of the Dillon Read Plan, Dillon Read had advised Toolco and TWA that the interest rate on the permanent bank financing would be in the neighborhood of five or five and one-half per cent. Sessel, on behalf of Irving, advised TWA and Toolco that negotiations as to interest rate would have to await the formation by it of a banking group and represented to Toolco and to TWA that when a banking group was formed, Toolco and TWA would have a full opportunity to negotiate the interest rate. Thereafter, Metropolitan, after consultation with Equitable and with Equitable's approval, agreed to supply the portion of the long-term financing not being supplied by Equitable, and Metropolitan and Equitable agreed among themselves that the interest rate on such financing would be 6½%. Upon information and belief, this interest rate was in excess of that on any other financing theretofore or thereafter supplied by Equitable to any other corporation in 1961. When

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Irving formed its banking group, the members thereof, upon information and belief, after consultation with Equitable and Metropolitan, agreed among themselves and with Metropolitan and Equitable that the interest rate on the short-term financing would be 6%. Thereafter, Irving refused to negotiate or to permit Toolco or TWA to negotiate the rate of interest with the banking group which it had formed. Upon information and belief, Irving and Dillon Read in violation of their respective fiduciary obligations to TWA each concealed from TWA and Toolco that other commercial banks were interested in participating in such bank financing upon other and more favorable terms to TWA. By reason of such concealment and since no acceptable alternative to the Dillon Read Plan appeared feasible, TWA was compelled to accept the 6% interest rate on the bank financing and the 6½% rate on the insurance company financing.

90. In May 1961, Equitable and Metropolitan and Irving and its associated banks committed themselves to the Dillon Read Plan but under conditions which permitted them to withdraw their commitment in the event of a change in TWA's management. Prior to the making of this commitment Charles S. Thomas (hereinafter "Thomas"), TWA's then president, upon information and belief, had advised Dillon Read and other of the conspirators that he would remain as president of TWA only if he were given a substantial increase in salary and a lifetime retirement annuity. Although the conspirators, prior to committing themselves to the Dillon Read Plan, thus knew of Thomas's plans and the resulting uncertainty as to his tenure, neither Dillon Read nor any of the conspirators informed Toolco or TWA thereof until after Toolco without knowledge of Thomas's planned demands (i) had committed

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itself to the Dillon Read Plan; (ii) had guaranteed interim loans to be made to TWA up to \$40 million pursuant to an agreement between TWA and Irving and its associated banks, said loans to be used by TWA for the jet equipment program and to repay existing bank loans; and (iii) had guaranteed the Sinking Fund Bonds of TWA held by Equitable, the maturity of which was accelerated to the same date as that of the interim bank financing. The maturity of such interim debt was fixed as the initial closing date under the Dillon Read Plan. The closing was originally scheduled for May 31, 1960 but was postponed to June 23, 1960 and thereafter, at the request of Equitable, to July 23, 1960.

91. On information and belief, prior to July 23, 1960, the precise date being unknown to Toolco, Metropolitan and Hagerty joined the conspiracy hereinabove alleged and, to insure the success thereof, the conspirators entered into a further agreement and understanding to the following effect:

(a) The conspirators, and each of them, would refuse to lend moneys to TWA or Toolco so long as Toolco controlled TWA;

(b) The conspirators, and each of them, would refuse to finance or otherwise deal with TWA or Toolco or Hughes except upon condition that Toolco place its stock in TWA in a lender-controlled voting trust;

(c) The conspirators would use their concerted efforts to obtain and maintain control of TWA and to foreclose all other lenders from the opportunity of supplying financing to TWA except with their consent.

92. Prior to July 23, 1960, but after Toolco was firmly committed to the Dillon Read Plan, after it had guaran-

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ted \$54,500,000 principal amount of TWA's indebtedness and after loan agreements had been executed permitting the lenders to withdraw from their commitments in the event of a change in management deemed by them to be adverse, Thomas, upon information and belief, after consultation with the knowledge and approval of the conspirators, for the first time demanded, on threat of resignation, a substantial increase in salary and lifetime retirement annuity of \$50,000 per year. Toolco refused to recommend to TWA the acceptance of such demands under pressure of the financing but itself offered Thomas equivalent benefits. Thomas insisted that his demands should be met by TWA and upon information and belief, was supported in said demands by the conspirators.

93. Thereafter, on July 21, 1960, Toolco advised representatives of the lending institutions that Thomas, having finished the two years of service to which he was committed, intended to resign. Toolco proposed to the lenders that the financing proceed as planned upon the understanding that if a president of TWA acceptable to the lenders had not been found within 90 days Toolco would place its TWA stock in a lender-controlled voting trust. Representatives of Metropolitan and Equitable tentatively accepted this proposal but it was thereafter rejected by the conspirators. Upon information and belief, the decision to reject the proposal was made jointly by Oates and Hagerty. The conspirators thereafter refused to acquiesce in any plan which would permit Toolco to name the president of TWA. When a compromise between Thomas and Toolco appeared probable, Thomas consulted Oates and Hagerty. Upon information and belief, they advised Thomas not to accept any compromise but to resign. Thomas did so. Immediately upon his resignation the conspirators claimed that there had been an adverse change in TWA's management

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and, exercising the out which they had insisted be included in the loan agreements, cancelled the lenders' commitments to TWA under said agreements.

94. Thereupon the conspirators entered upon a course of conduct designed and calculated to compel Toolco to place its TWA stock in a lender-controlled voting trust and to give to the conspirators control of TWA:

(a) The conspirators agreed to proceed with the Dillon Read Plan if, but only if, by September 1, 1960, Toolco placed its TWA stock in a voting trust prior to any financing. The maturity of the TWA debt which Toolco had guaranteed was extended to September 1.

(b) Irving insisted as a condition to its consent to the extension of the maturity of the interim bank debt that TWA accept no further deliveries of jet aircraft.

(c) Although Toolco repeatedly offered to recommend a president for TWA acceptable to the lenders and although Toolco proposed for their consideration several qualified executives and offered to consider any alternative suggestions the lenders might make, the conspirators refused to consider any of Toolco's proposals or make any alternative suggestions.

(d) Irving was requested by Toolco to formulate and implement a new financing plan which would not require Toolco to place its TWA stock in a lender-controlled voting trust. Irving through Sessel agreed with Toolco to use its best efforts to formulate such a plan. During August and September, 1960, Irving represented to Toolco that it was diligently engaged in doing so. When Toolco sought to participate in negotiations and discussions which Irving represented were in progress, Irving further

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represented to Toolco that such participation would be inadvisable and did not permit Toolco to participate therein. By such representations, Irving led and induced Toolco to refrain from making any efforts to secure financing for TWA elsewhere or to obtain for itself financing required to repay its obligations to Irving and others incurred for the benefit of TWA.

(e) Upon information and belief, Irving refused to permit several large banks which were not a part of the Irving banking group as previously formed to participate in formulating and implementing a financing program although Irving knew that such banks were prepared to participate therein. Irving concealed from TWA and Toolco the willingness of such banks to participate in a banking group without a voting trust.

(f) The conspirators realized that any extended delay in the arrangement of permanent financing would cause a substantial delay in the delivery of Convair aircraft to TWA and that the damage which would result from such a delay created pressure upon Toolco and TWA to yield to their demands.

(g) Irving finally presented to Toolco a plan on September 26, 1960 (hereinafter "the Bankers' Plan"). Irving knew or should have known that the Bankers' Plan as submitted could not be effectuated. The Bankers' Plan contemplated that General Dynamics would participate in the financing to the extent of \$40 million but as Irving knew or should have known General Dynamics did not have the available resources to extend a \$40 million credit. Toolco accepted the Bankers' Plan in order to avoid the damage to TWA which would result from a delay in arranging financing for the Convair aircraft.

(h) General Dynamics sought to obtain the support of Prudential, its traditional senior lender, in

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order to supply the \$40 million credit which the Bankers' Plan contemplated. Upon information and belief, Prudential consulted one or more of the conspirators and thereupon refused to give the required support. Toolco thereupon made arrangements to relieve General Dynamics of a substantial part of General Dynamics' commitment under the Bankers' Plan by itself supplying an additional \$30 million to be realized through the liquidation of assets unrelated to TWA. It negotiated, prepared, executed and delivered to Irving a plan which was substantially identical to the Bankers' Plan except for this change.

(i) On October 6, 1960 Irving and its associated banks met, avowedly to consider Toolco's proposal. A representative of Equitable attended this meeting. Upon information and belief, prior to the presentation of Toolco's plan, Sessel advised the banks that Hughes had stated that a voting trust would be preferable to receivership and thereupon the banks agreed that they would not consider Toolco's proposal and that in order to pressure Toolco and Hughes into a voting trust they would inform Toolco's representatives that (i) no more loans would be made to TWA without an immediate voting trust agreement, (ii) the banks would proceed with the Dillon Read Plan if the insurance companies would also do so, (iii) should Toolco and Hughes not accept the Dillon Read Plan with a lender-controlled voting trust, Irving and the other banks would set off at the opening of business on October 7 deposit balances against outstanding loans to TWA and Toolco and (iv) the banks' decision was final, no more plans would be considered and Toolco and Hughes would have until 5:00 P. M. Eastern Daylight Saving Time to accept the banks' demands.

(j) In midafternoon Toolco's representatives were called into the meeting. Pursuant to the agree-

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ment theretofore made, Sessel, as spokesman, stated to Toolco that its proposal was totally unacceptable and refused to permit any discussion thereof. He further stated that the banking group would not require Toolco to place its TWA stock in a lender-controlled voting trust. He demanded that before 5:00 P.M. EDT Toolco agree by written document executed by its then president, Hughes, to accept the Dillon Read Plan with such a voting trust. He stated that if the demands of the banks were not met he would place Toolco in receivership. He further threatened that unless Toolco agreed to a lender-controlled voting trust he would collect summarily the substantial indebtedness owed to Irving by Hughes personally which had no relationship to TWA or Toolco, which debt was not yet due but the maturity of which could be accelerated, and proceed immediately with a private foreclosure of Hughes' stock in Toolco which had been pledged as security for Hughes' debt to Irving.

(k) Prior to 5:00 P.M. Toolco acceded to the demands of Irving provided that TWA be given the right to refund without premium or penalty the senior indebtedness to be provided to TWA and that Toolco be entitled to purchase all such indebtedness at 100% of the principal amount plus accrued interest. Irving and the other banks agreed to such a provision and a representative of Equitable who was present at the meeting accepted it in principle.

(l) Thereupon Metropolitan after consultation with other of the conspirators demanded for the first time that Toolco's right to acquire the bank and insurance company debt and thus terminate the Voting Trust be subject to the payment of a penalty to be initially 22% of the principal amount of the insurance company debt, plus accrued interest, i.e., \$20,416,000. This punitive and unprecedented demand was designed solely for the purpose of preserving the lender-controlled voting trust.

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(m) Toolco promptly submitted to Equitable an alternative proposal which contemplated a voting trust but reserved to Toolco a right to purchase the senior notes for 100% of their principal amount plus accrued interest. In order to replace the participation of Metropolitan and to reduce Equitable's participation to an amount not greater than its existing loan to TWA, Toolco, in this proposal, committed to take \$67.3 million of the sinking fund notes. Although this proposal afforded the lending banks an improved security position, Irving peremptorily refused to consider the plan on the ground that it and its associated banks did not want to do business with Hughes.

(n) Thereafter, on October 19, 1960, Equitable and Metropolitan, with full knowledge of the pressure upon Toolco and TWA to accept any demands in order that Convair aircraft might be delivered to TWA as soon as possible, stated in identical terms to Toolco and TWA their willingness to reinstate the Dillon Read Plan, provided that (i) Toolco agree to place its TWA stock in a lender-controlled voting trust; (ii) Toolco consent to a penalty in the initial amount of 22% on \$92,800,000 as a condition to termination of the Voting Trust by the refinancing of the loans to TWA; (iii) the by-laws of TWA (providing for reconstitution of the TWA Board of Directors by a majority of the stockholders at any time without cause) remain unchanged; and (iv) no employment contract be made with an executive officer of TWA providing for tenure of office beyond the date of the next annual election of officers. The additional demands thus made were designed and calculated to give to the conspirators the power to determine the management of TWA, including its chief executive officer, to reconstitute the Board of Directors of TWA at will, and to manage and control the business and affairs of TWA in such manner as they should determine.

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(o) Also on October 19, 1960, Irving made a similar proposal to TWA and Toolco. Irving stated (i) that acceptance of Metropolitan's and Equitable's proposals was a prerequisite to any commitment by it and its participating banks, and (ii) that in the event it, as agent for the other lending banks, did not have Toolco's unconditional agreement in writing to its proposal by October 21, 1960, Irving and the other lending banks would enforce their rights of collection of TWA's debts by all available remedies, including the right of set-off.

(p) Toolco received the October 19 letters on Friday, October 21. Toolco endeavored to negotiate a reduction of the 22% premium but the conspirators remained adamant. Thereupon, Toolco entered into an oral understanding with Irving that on Monday, October 24, a full quorum of TWA's Board of Directors would be asked to pass upon the financing after the Toolco nominee directors had been notified that they could no longer assume that they were being indemnified by Toolco. On the basis of this understanding with Irving, Toolco accepted the October 19 demands of the lending institutions.

(q) Irving refused to honor its agreement to permit TWA's full Board of Directors to consider the October 19 proposals. Toolco, therefore, on October 22, 1960, notified the lenders that it no longer considered itself bound by its conditional acceptance thereof. Toolco also notified Irving that it would seek to find other sources of financing to replace Irving and its banking group. Thereupon Irving and certain members of said banking group commenced offsetting TWA and Toolco balances against TWA's debt to such banks. At the same time, widespread publicity was given in the press and otherwise to accounts of Toolco's withdrawal of its conditional acceptance of the October 19 proposals. Said accounts were false and misleading and calculated to

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injure the reputation of Toolco. Upon information and belief, such false and misleading publicity emanated from Irving and Sessel, was known to them to be false and misleading and was designed by them to preclude TWA or Toolco from finding any source of financing for TWA's jet equipment program other than Irving and its associated banks and Metropolitan and Equitable and then only upon terms which included a lender-controlled voting trust.

(r) Thereafter, Toolco endeavored to develop an alternative plan for financing TWA's requirements. Toolco's efforts to develop such a plan were unsuccessful for reasons which included (i) the unwillingness of other lending institutions to finance TWA without the approval and support of Equitable, TWA's traditional senior lender, (ii) the control and domination by Metropolitan, Equitable and Prudential of the market for major airline financing, and (iii) the attitude of the financial community which was based on erroneous assumptions of fact arising from the false and misleading statements of Irving and Sessel. Faced with no alternative by reason of the unlawful conduct of the conspirators, Toolco on November 30, 1960, committed itself to accept the lender-controlled voting trust, the additional demands of the conspirators and the Dillon Read Plan.

95. Thereafter, in December, 1960, the necessary transactions and agreements to effectuate the Dillon Read Plan, to place the common stock of TWA owned by Toolco in a lender-controlled voting trust, and to comply with the additional demands of the conspirators were effected. By the terms of such agreements, the conspirators acquired and now possess the power to control the business and affairs of TWA. In furtherance of the conspiracy herein-

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above alleged the conspirators since December, 1960 have used the power so acquired:

(a) To install a management of TWA which is responsive to them rather than to the owners of TWA;

(b) To prolong and perpetuate their control of TWA by (i) prolonging and perpetuating the Voting Trust and (ii) frustrating the option which they gave to Toolco in December, 1960 to regain control of TWA by acquiring, upon the payment of applicable penalties, all the Series A Sinking Fund Notes and Series A Serial Notes;

(c) To impose upon TWA commitments which extend beyond the term of the Voting Trust and which are not related to the repayment of the loans in connection with which the Voting Trust was created;

(d) To gain for themselves financial advantage at the expense of TWA through making additional loans to TWA under conditions which are not competitive; and

(e) To maintain TWA as a captive market for additional senior financing.

Breech, notwithstanding the fiduciary duty which he owed to Toolco as the equitable owner of the 78.2% of TWA's stock which he held in trust, while serving as voting trustee and as Chairman of the Board of Directors of TWA has participated in the acts and course of conduct by which such objectives have been attained; Tillinghast who was elected president of TWA in the manner hereinabove alleged has furthered the efforts of the lending institutions to maintain control of TWA through the voting trustees; and Breech and Tillinghast joined the conspiracy hereinabove alleged.

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96. Since December 1960, the conspirators have done or caused to be done the following in furtherance of said conspiracy:

(a) On February 28, 1961, TWA's Board of Directors was reconstituted so that a majority of said Board consisted of persons of the conspirators' choosing. Thereafter, on April 27, 1961, the TWA Board of Directors was further reconstituted by removing therefrom all directors who represented the interests of Toolco, with the single exception of Holliday, the voting trustee named by Toolco. Breech caused himself to be elected chairman of TWA's Board of Directors as so reconstituted.

(b) The conspirators selected Tillinghast to be TWA's president and chief executive officer and, upon information and belief, at or about the time of his selection explained to him the nature of the conspiracy and the contemplated course of conduct which would prevent Toolco from regaining control of TWA. The conspirators thereafter caused TWA to enter into a contract by which upon Tillinghast's retirement at any time following the termination of the Voting Trust and whether or not he has rendered any services to TWA (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of \$50,000 per year until he reaches age 65 and \$30,000 per year thereafter, all as more fully alleged in paragraph 53 hereof.

(c) The conspirators have failed for reasons unrelated to any proper corporate or business purpose of TWA, to take advantage of opportunities to strengthen TWA's business. One of such opportunities which they have failed to pursue is that of a merger of Northeast into TWA. Because of TWA's route structure the traffic on its routes for many years has decreased sharply in the winter months. To

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remedy this seasonal imbalance Toolco in 1960 entered into negotiations with Atlas Corporation, the controlling stockholder of Northeast, looking toward a merger of Northeast with and into TWA. Northeast by reason of its east coast route to Florida has a sharp seasonal imbalance which is the reverse of that of TWA. Such negotiations, which were carried on with the knowledge of TWA, culminated in May, 1960 in an agreement of merger which Atlas Corporation and Toolco agreed to recommend to the Board of Directors of Northeast and TWA, respectively. Under the merger agreement, the merger was subject to Board approval and to approval by a majority of the shareholders of TWA other than Toolco. Breech and Olds, with full knowledge of the agreement thus made by Toolco with Atlas Corporation, failed to recommend the merger to the TWA Board of Directors and the conspirators failed to take action to consummate a merger with Northeast either on the terms negotiated by Toolco or on other appropriate terms, notwithstanding the suggestion made by Toolco in May, 1961 that it was willing to discuss with TWA the possibility of Toolco's assuming any financial risk that such a merger might otherwise impose upon TWA and notwithstanding the recommendations of TWA's operating personnel that such a merger was in the best interests of TWA.

(d) For reasons unrelated to any interest of TWA, the conspirators refused to grant Toolco's request for a one week's postponement in an offering by TWA of \$111,235,900 principal amount of subordinated debentures with warrants attached. This offering was being made to TWA's stockholders pursuant to agreements made in December, 1960 at the time of the creation of the Voting Trust. The purpose of the offering was to refund an interim note of \$100 million which was accepted by Toolco in payment of obligations of TWA to it. By the terms of said agreements the entire proceeds of the offering

Toolco's Answer and Counterclaims

would be paid to Toolco, which had agreed to purchase all unsubscribed debentures up to a principal amount of \$100 million, unless Toolco exercised an option to subscribe to all the debentures to which others did not subscribe. Toolco desired a postponement of the offering in order that it might make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a secondary offering would have permitted TWA to obtain an additional \$11,235,900 in junior capital and Toolco to obtain \$100 million in cash. Upon information and belief, the conspirators refused Toolco's request for a week's delay in order to prevent Toolco from obtaining cash resources which might be used to purchase the Series A Sinking Fund Notes and Series A Serial Notes and thus to terminate the Voting Trust.

(e) The conspirators entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing, even though, upon information and belief, the number of aircraft which TWA agreed to acquire was in excess of TWA's needs and financial capabilities. The total cost of such additional jet equipment is in excess of \$187,500,000 and a primary purpose of the conspirators in entering into this program was, upon information and belief, to create a need for additional financing for TWA upon terms which would perpetuate their control of TWA.

(f) Toolco made various proposals to TWA which would have provided additional capital to TWA. One of such proposals would have guaranteed to TWA an additional \$100 million of equity capital and was conditioned solely upon the termination of the Voting Trust. The conspirators refused to entertain any of such proposals upon their merits and rejected or allowed such proposals to expire without any negotiations with respect thereto.

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(g) On June 30, 1961, the conspirators caused TWA to file its complaint in the instant action in which TWA seeks, among other relief, to divest Toolco of its interest in TWA.

(h) Thereafter, without the approval by or consultation with Toolco or approval by the other stockholders of TWA, the conspirators caused TWA to enter into agreements with Metropolitan, with Equitable and with Irving and its associated banks for the supplying of \$147 million of additional financing to TWA. As more fully alleged in paragraph 53 hereof, the conspirators in connection with said additional financing caused to be executed a Supplemental Indenture giving to Metropolitan and Equitable the right to accelerate the maturity of said \$147 million of indebtedness in the event the Voting Trust were to terminate whether in accordance with its terms or otherwise or in the event Toolco were to exercise the option given to it in December, 1960, to acquire the Series A Sinking Fund Notes and Series A Serial Notes upon the payment of the applicable penalty.

97. During the years in which Toolco nominated a majority of the directors of TWA, namely from 1947 through 1960, the business of TWA grew steadily. From 1947 through 1960 TWA's operating revenues grew more than four times. In 1960 TWA had earnings before taxes in excess of \$15,000,000. During the years from 1947 through 1960 TWA realized earnings before taxes of \$5,600,000.

98. By reason of the unlawful conspiracy and acts hereinabove alleged:

(a) TWA's jet equipment program was disrupted and the delivery of jet aircraft which had been or-

Toolco's Answer and Counterclaims

dered by Toolco from General Dynamics for the benefit of TWA was delayed;

(b) TWA has been compelled to obtain financing upon unfavorable terms and at higher interest rates than it would have otherwise had to pay;

(c) TWA's assets have been wasted;

(d) TWA has lost valuable opportunities;

(e) The business and affairs of TWA have steadily deteriorated.

Upon information and belief, TWA in 1961 lost in excess of \$30 million without regard to accelerated depreciation on piston aircraft and before applicable tax credits, or an adverse change from 1960 in excess of \$45 million. TWA's present management estimated in September, 1961 that by March, 1962 TWA, which started 1961 with a favorable cash balance of more than \$40,600,000, would have a cash deficit of \$2,500,000.

99. By reason of the foregoing, TWA has suffered and is continuing to suffer substantial damages in its business and property, the exact amount of which is presently unknown to Toolco but which is, upon information and belief, estimated to be in excess of \$45 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

100. TWA is threatened with irreparable injury.

101. All additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

Toolco's Answer and Counterclaims

**AS AND FOR A FOURTH COUNTERCLAIM AGAINST TWA AND
AGAINST ALL ADDITIONAL DEFENDANTS**

102. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 73 through 97, inclusive, hereof.

103. Jurisdiction of this Court over this counterclaim arises from the violations of the antitrust laws herein alleged.

104. Since the creation of the Voting Trust, TWA, under and by reason of the control of the conspirators over its business and affairs, has participated in the acts and course of conduct by which the conspiracy has been furthered, as hereinabove more fully alleged.

105. By reason of the facts herein alleged, Toolco has suffered and is continuing to suffer substantial damages in its business and property, the amount of which is presently estimated to be in excess of \$77 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

106. Toolco is threatened with irreparable injury.

107. TWA and the additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

108. Toolco has no adequate remedy at law.

**AS AND FOR A FIFTH COUNTERCLAIM AGAINST TWA AND
AGAINST ALL ADDITIONAL DEFENDANTS**

109. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 73 through 97, inclusive, hereof.

Toolco's Answer and Counterclaims

110. Jurisdiction of this Court is ancillary to its jurisdiction over the third and fourth counterclaims heretofore alleged in that this Court has jurisdiction to grant all available relief upon the facts therein alleged.

111. During 1960 Equitable, Metropolitan, Irving, Hagerty, Oates and Sessel, together with others, entered into a conspiracy to deprive Toolco of its voting rights with respect to TWA stock owned by it and thus to deprive Toolco of control of TWA. They made their demands for a lender-controlled voting trust not for the purpose of protecting any legitimate interest which they might have as lending institutions but rather for the purpose of injuring, maliciously and wilfully, Toolco and Hughes. In order to coerce and compel Toolco to place its TWA stock in such a lender-controlled voting trust, they, acting in concert, took or caused to be taken the actions alleged in paragraphs 90 through 94 hereof.

112. After Toolco, by reason of the wrongful activities of the conspirators, had been coerced and compelled to place its 78.2% stock interest in TWA in the Voting Trust, Breech and Tillinghast joined in the conspiracy hereinabove alleged and since January 1961, the conspirators, acting in concert and in furtherance of the objects of the conspiracy, have engaged in a course of conduct designed and calculated to interfere with Toolco's rights as the equitable owner of over 78% of the stock of TWA, to maintain and perpetuate the Voting Trust and the control over TWA which the conspirators unlawfully acquired, and to manage the business and affairs of TWA in the interests of the conspirators and not in the interests of the owners of TWA. TWA, under the control of the conspirators, has participated in said course of conduct and the acts in furtherance of the conspiracy more fully alleged in paragraph 96 hereof.

Toolco's Answer and Counterclaims

113. Among the objectives of the conspiracy has been the creation and perpetuation of a voting trust for a period beyond that permitted by applicable law. Under Section 218 of the Delaware Corporation Law the maximum term for which a voting trust of a Delaware corporation may be created is ten years and a voting trust may be extended for an additional term of ten years only in the last year of said voting trust and then only in the manner provided in said Section 218. The conspirators required that Toolco agree in December, 1960 to extend the Voting Trust at the request of Irving as agent for the holders of TWA's Series A Sinking Fund Notes and Series A Serial Notes for an additional term not to exceed the maximum permitted by Delaware law and since the creation of the Voting Trust have sought to perpetuate the Voting Trust as hereinabove alleged without the consent or acquiescence of Toolco.

114. As a result of the acts of the conspirators hereinabove alleged, Toolco has suffered damages in an amount presently estimated to be in excess of \$77 million.

115. The continuation of the conspiracy herein alleged will result in irreparable injury to Toolco.

116. Toolco has no adequate remedy at law.

117. TWA and all additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

AS AND FOR A SIXTH COUNTERCLAIM AGAINST TWA

118. Toolco repeats and realleges each and every allegation of paragraphs 42, 43 and 50 hereof.

119. As a part of the transactions in December 1960 by which TWA's jet equipment program was financed, Toolco accepted TWA's interim subordinated note in the amount

Toolco's Answer and Counterclaims

of \$100 million and TWA agreed to refund said note from an offering of subordinated income debentures and to pay interest on said note at the rate of 6½% per annum to the date of refunding.

120. TWA refunded said interim note on June 13, 1961 but failed and refused to pay interest to the date of such refunding on the entire principal amount of said note.

121. The amount of such interest which TWA failed and refused to pay is \$72,089.55 and such amount remains due payable to Toolco by TWA.

Prayer for Relief

WHEREFORE, Toolco prays judgment dismissing the complaint herein and further prays that this Court order, adjudge and decree:

With Respect to the First Counterclaim

1. That Equitable, Metropolitan and Irving be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

2. That the employment contract between Tillinghast and TWA in so far as it relates to the payment of any pension or annuity be declared void and of no effect and that TWA be perpetually enjoined from paying any annuity or pension to Tillinghast thereunder.

3. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Reed and Irving be perpetually enjoined from taking any action which is designed or would have the effect

Toolco's Answer and Counterclaims

of preventing the termination of the Voting Trust in accordance with its terms.

4. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Read and Irving account to Toolco for all damages suffered by Toolco by reason of the acts alleged in the First Counterclaim.

With Respect to the Second Counterclaim

1. That Equitable and Metropolitan have acquired control of TWA in violation of Section 408 of the Federal Aviation Act of 1958.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

With Respect to the Third Counterclaim

1. That the additional defendants have violated Sections 1 and 2 of the Sherman Act.

2. That Metropolitan and Equitable have violated Section 7 of the Clayton Act.

3. That the Voting Trust is invalid and void.

4. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting

Toolco's Answer and Counterclaims

Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

5. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

6. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

7. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with TWA while it is controlled by Toolco.

8. That the additional defendants be perpetually enjoined from interfering in any way with the exercise by Toolco of its rights as a stockholder of TWA.

9. That the additional defendants pay to TWA \$135 million, three-fold the damages sustained by TWA, and pay to Toolco its costs, attorneys' fees and expenses.

With Respect to the Fourth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes at the principal amount thereof plus accrued interest and without the payment of any premium or penalty.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the

Toolco's Answer and Counterclaims

maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with Toolco and with TWA while it is controlled by Toolco.

6. That the additional defendants pay to Toolco the sum of \$231 million, three-fold the damages sustained by Toolco, together with costs and attorneys' fees.

With Respect to the Fifth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes without the payment of any premium or penalty.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants pay to Toolco damages in the amount of \$77 million.

With Respect to the Sixth Counterclaim

1. That Toolco recover damages in the amount of \$72,089.55 together with interest from and including June 18, 1961.

Toolco's Answer and Counterclaims

TOGETHER WITH Toolco's costs and disbursements and such other, further and different relief as to the Court shall seem just and proper.

Dated: New York, N. Y.
February 12, 1962.

/s/ CHESTER C. DAVIS

.....
Chester C. Davis
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.:

RAYMOND M. HOLLIDAY, being duly sworn, deposes and says that he resides at Houston, Texas; that is Executive Vice President of Hughes Tool Company, a corporation, defendant herein; and that he has read the foregoing answer and counterclaims and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to such matters believes them to be true.

/s/ RAYMOND M. HOLLIDAY

Subscribed and sworn to before me this 12th day of February, 1962.

/s/ DALLAS KELLER
Notary Public in and for
Los Angeles County, California

My commission expires July 23, 1963

Holliday's Answer

[Doc. 83]

[CAPTION]

61 Civ. 2324

Defendant Raymond M. Holliday (hereinafter "Holliday") by his attorney, Chester C. Davis, for his answer to the complaint herein states:

ANSWERING THE FIRST CLAIM FOR RELIEF

1. Denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.
2. Admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.
3. Admits that Hughes Tool Company (hereinafter "Toolco") is a corporation organized and existing under the laws of the State of Delaware and that it has assets of several hundred million dollars, and except as so admitted denies each and every allegation of paragraph 3 of the complaint.
4. Admits that Howard R. Hughes (hereinafter "Hughes") has been the sole stockholder of Toolco from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.
5. Admits that he has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

Holliday's Answer

6. Admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of \$100 million, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of \$300 million and net income after taxes in excess of \$6 million, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

7. Admits that commencing in or about the year 1939 and at various times thereafter Toolco acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas")) had prepared to the general knowledge of the air

Holliday's Answer

carrier industry plans and drawings and otherwise had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design state and was terminated in 1955 by General Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Admits that prior to May 1, 1956, Toolco considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it would furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

Holliday's Answer

13. Admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each and every allegation of paragraph 18 of the complaint.

15. Admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years, and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA

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a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded \$35 million, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

19. Admits that subsequent to 1955 Toolco discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Admits that in March 1961, after consideration of TWA's requirements for additional jet-powered aircraft, some officers of TWA recommended to the Board of Directors of TWA that TWA's needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed

Holliday's Answer

on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately \$187,500,000, and that TWA arranged for the borrowing of \$147 million in 1961 from certain insurance companies and banks and except as so admitted denies the allegations of paragraph 35 of the complaint.

22. Admits that on or about May 31, 1961, Toolco sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Admits that TWA requested the Securities and Exchange Commission to accelerate the effective date of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Admits that pursuant to the direction of the Securities and Exchange Commission Toolco's counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under conditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments in-

Holiday's Answer

curred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

ANSWERING THE SECOND CLAIM FOR RELIEF

26. Denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Holliday repeats to the same extent as if herein fully set forth each and every denial or admission which he has made with respect to the paragraphs so realleged.

ANSWERING THE THIRD CLAIM FOR RELIEF

27. Denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Holliday repeats to the same extent as if herein fully set forth each and every denial or admission which he has made with respect to the paragraphs so realleged.

AS A FIRST AND COMPLETE DEFENSE TO THE COMPLAINT:

28. The complaint, and each of the claims for relief alleged therein, fails to state a claim upon which relief can be granted.

*Holliday's Answer***AS A SECOND AND COMPLETE DEFENSE TO THE COMPLAINT:**

29. The facts alleged in the complaint do not constitute violations by Toolco, Holliday or Hughes, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), or of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 18 (1946 Ed.)), and since plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the motion [sic] and over each of the claims for relief alleged in the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

30. Since 1944 the control of TWA by Toolco, the acquisition by Toolco of more than 78% of the common stock of TWA, and all commercial transactions between Toolco and TWA including all transactions relating to financing or the acquisition of equipment were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "Board") under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Accordingly, pursuant to Section 414 of the Federal Aviation Act of 1958 (49 U.S.C. § 1384) Toolco is exempt and relieved from the operation of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may have been necessary to enable it to do anything authorized, approved or required by said orders of the Board.

31. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was,

Holliday's Answer

however, within the contemplation of the Board in approving control of TWA by Toolco. Moreover, said proposal was specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

32. Holliday adopts, repeats and realleges the allegations of paragraphs 42-48, 50-52, 69-70, 78-85, 87-90, 92-94 of Toolco's answer and counterclaims as though fully set out herein.

33. Neither Toolco, Holliday, nor Hughes ever had any obligation, contractual or otherwise, to acquiesce in, or consent to, the terms and conditions insisted upon by the lending institutions in connection with the 1960 financing as hereinabove described.

34. Toolco, Holliday and Hughes were justified in resisting the demands of the lending institutions that the terms and conditions demanded by said lending institutions as a prerequisite to supplying financing be met and in attempting to obtain financing on more reasonable terms. The damage sustained by TWA as a result of delay in obtaining financing was caused solely and exclusively by the insistence of the lending institutions on the terms and conditions hereinabove described, without any improper conduct on the part of Toolco, Holliday or Hughes contributing thereto.

Holliday's Answer

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

35. Holliday adopts, repeats and realleges, to the same extent as though fully set forth herein, the allegations contained in paragraphs 42-48, 50-53, 55, 62, 69-70, 73-76, 78-98 of Toolco's answer and counterclaims.

36. The damages, if any, alleged in the complaint to have been sustained by TWA resulted from the unlawful acts of the additional defendants and were proximately caused by them and did not result from any improper conduct on the part of defendants Holliday, Toolco or Hughes.

37. TWA's inability to obtain financing prior to 1960 and the delay in its jet equipment program occasioned thereby, was caused by and was a result of the unlawful acts of the additional defendants in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Such unlawful acts include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States.

(c) An agreement in restraint of interstate trade and commerce of the United States, to refuse to supply financing to TWA or Toolco so long as TWA was, is or shall be controlled by Toolco.

Holliday's Answer

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would sully [sic] financing to that airline upon any terms.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA.

(g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust.

38. Upon information and belief, at some time in or about March of 1960, the additional defendants entered

Holliday's Answer

into a combination and conspiracy with the intent and purpose that:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA except after its acceptance of such predetermined interest rates.

As a result of said conspiracy, and without any fault on the part of Toolco, Holliday or Hughes, the financing of TWA's jet equipment program was delayed and the acquisition of jet equipment by TWA was impeded.

39. In furtherance of and pursuant to the conspiracy hereinabove alleged, the additional defendants:

Holliday's Answer

(a) Caused TWA to enter into a contract of employment with Tillinghast, more fully described in paragraph 53 of Toolco's answer and counterclaims.

(b) Caused TWA to enter into agreements in 1961 for the borrowing of additional funds amounting to \$147,000,000 for the purpose of maintaining and perpetuating their control over TWA under circumstances which amount to self-dealing and breach of fiduciary obligations as more fully described in paragraph 53 of Toolco's answer and counterclaims.

(c) Caused TWA to file its complaint in this action in which TWA seeks, among other things, to divest Toolco of its interest in TWA.

40. The damage, if any, sustained by TWA as a result of the unfavorable terms and conditions of the 1960 financing, including the higher interest rate it was required to pay, resulted solely and exclusively from the unlawful acts and conspiracy hereinabove described and were not caused by any improper conduct on the part of Toolco, Holliday or Hughes.

41. TWA's impaired ability to obtain financing, if any, results solely and exclusively from the unlawful acts and conspiracy hereinabove described and by reason of the fact that the lending institutions are using TWA as a captive market for financing and engaging in self-dealing in arranging TWA's financing and was not caused by any improper conduct on the part of Toolco, Holliday or Hughes.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

42. If the allegations of the complaint relating to the acts alleged to have been committed by Toolco, Holliday and Hughes and the statements alleged to have been made by them subsequent to 1960 are true, such acts and state-

Holliday's Answer

ments were not wilful and malicious but were justifiable, and true and made for the purpose of protecting Toolco's and TWA's legitimate interests. None of such acts or statements caused any injury or damage to TWA but any injury or damage sustained by TWA was proximately caused by the unlawful acts of the additional defendants.

43. Holliday adopts, repeats and realleges the facts contained in paragraphs 42-48, 50-55, 62-70 and 73-96 of Toolco's answer and counterclaims as though fully set forth herein.

44. The statements alleged in paragraph 46 of the complaint to have been made by Toolco, Holliday and Hughes that the Voting Trust was invalid, if made, were not made wilfully and maliciously but were justifiable and true by reason of the following facts and circumstances:

(a) Additional defendants Metropolitan and Equitable are persons engaged in phases of aeronautics within the meaning of Section 408 of the Federal Aviation Act by reason of activities which, upon information and belief, have constituted them, together with The Prudential Insurance Company of America (hereinafter "Prudential"), the largest suppliers of airline financing in the country upon whom the major airlines of the United States are depended for long-term senior financing. Said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. In December, 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and

Holiday's Answer

Equitable have continued to maintain and perpetuate their control of TWA without Board approval. In August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply to TWA an additional \$147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termination of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

(b) Said Voting Trust is further invalid because entered into as a result of acts, combinations and conspiracies in violation of the antitrust laws of the United States as hereinabove alleged.

(c) Said Voting Trust is further invalid because accomplished and maintained as a result of an unlawful conspiracy to divest Toolco of control of TWA for the benefit of the additional defendants and as a result of the breach of fiduciary obligations by various of the additional defendants.

45. The demand that TWA's 1961 registration statement be revised was not wrongful and was not made wilfully and maliciously for the purposes alleged in paragraphs 45 and 67 of the complaint but was justifiable [*sic*] made for the purpose of correcting errors and omissions in said registration statement and in order to protect Toolco and TWA.

Holiday's Answer

46. The request by Toolco for a deferral of the public offering of TWA's debentures was not made for the purpose of wilfully and maliciously injuring the business of TWA but was made for the purpose of permitting Toolco to make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a secondary offering would have permitted both Toolco and TWA to realize a substantial amount of cash which could have permitted the refunding of the 1960 financing and the termination of the Voting Trust. Upon information and belief the conspirators' refusal to grant Toolco's request for a one week delay was not in the best interest of TWA but was to the detriment of TWA and in order to prevent the realization of sufficient cash resources which might be used to refund the 1960 financing and thus to terminate the Voting Trust.

47. The suggestion by Toolco, Holliday or Hughes that TWA accept a proposed merger with Northeast was not made for the purposes alleged in paragraphs 47 and 67 of the complaint but was made because such a merger would be advantageous to TWA. Such a merger was recommended to TWA's Board of Directors by Toolco and TWA's operating personnel advised that such a merger was in the best interests of TWA. Toolco advised that it was willing to discuss with TWA the possibility of Toolco's assuming any financing risk that such merger might otherwise impose upon TWA.

48. The statements alleged in paragraph 46 of the complaint to have been made by Toolco, Holliday or Hughes relating to the purchase of Boeing aircraft and the 1961

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Holliday's Answer

financing thereof, if made, were not made wilfully or maliciously but were justifiable and true.

WHEREFORE, Holliday demands judgment dismissing the complaint, together with costs and disbursements.

Dated: New York, N. Y., March 26, 1962.

/s/ CHESTER C. DAVIS
Attorney for Defendant
Raymond M. Holliday
120 Broadway
New York 5, N. Y.
DIgby 9-0660

Pretrial Order, July 12, 1962

[Doc. 101]

[CAPTION]

61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held today on the respective appeals by the plaintiff and defendant Hughes Tool Company from rulings of the Special Master.

1. Defendant Hughes Tool Company appeals from a ruling of the Special Master overruling Toolco's objections to interrogatories propounded to it by plaintiff. After hearing counsel and reading the papers submitted in support of and in opposition to the appeal, the ruling of the Special Master is modified as indicated below and as modified is sustained.

Interrogatory No. 1 is modified by striking the words "or attorney". It is further modified by limiting any knowledge, information or belief of a director to such knowledge, information or belief which said director has acquired as a director of the defendant Toolco.

As to Interrogatory No. 4, the defendant need not make any answer thereto insofar as any of the named persons in this interrogatory are former employees or consultants. However, the defendant in its answer to this Interrogatory No. 4 shall indicate which of said persons are former employees or consultants. Insofar as consultants are concerned, the term shall embrace those persons who are in normal usage considered as independent contractors.

Interrogatory No. 7 refers to employees, agents and/or representatives of Toolco. The information requested by this interrogatory shall be furnished as to such persons only if those persons performed services of a personal nature or otherwise for Hughes individually and if such

Pretrial Order, July 12, 1962

services were compensated for by the defendant and not by Hughes personally.

The dates referred to in the interrogatories shall be computed from the date of this order.

2. Plaintiff has appealed from a ruling of the Special Master denying the motion of the plaintiff for an order determining that rule 4 of the Civil Rules of the United States District Court of the Southern District of New York is applicable in the instant case. After hearing argument of counsel and reading the papers in support of and in opposition to this motion, the appeal is disposed of as follows:

Irrespective of rule 4, the court has the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings. In view of the number of days which the defendant Toolco has devoted to the deposition of Tillinghast, the president of the plaintiff, defendant is directed to complete that deposition on or before July 25th, 1962. It shall commence taking the depositions of the other noticed individuals immediately thereafter. Plaintiff may renew its motion before the Special Master on September 20th, 1962 if at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff.

So ORDERED.

Dated: New York, N. Y.

July 12, 1962

CHARLES M. METZNER /s
U.S.D.J.

Pretrial Order, September 21, 1962

[Doc. 122]

[CAPTION]

61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held on September 19th, 1962 upon a notice from the attorneys for the plaintiff that it was appealing from so much of the Special Master's ruling of September 15th, 1962 as denied the plaintiff the right to proceed with the deposition of Howard R. Hughes on September 24th, 1962. After hearing counsel for the plaintiff, the defendant Hughes Tool Company and the additional defendants, and after reading the transcript of the hearing before the Special Master on September 15th, 1962, the appeal is disposed of as follows.

Sometime prior to July 12th, 1962 the Special Master evidenced his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was properly reached under the orders of the court. This concern of the Special Master was not aroused in connection with any application by the plaintiff to interfere with the priority of deposition previously determined by order of the court dated February 7th, 1962 as amended by the order of March 5th, 1962. In order to resolve that problem prior to the time of requesting Howard R. Hughes to appear as a witness, the Special Master afforded the Tool Company alternative procedures. Either it was to answer certain interrogatories as to the whereabouts of Howard R. Hughes, in order to facilitate the service of a witness subpoena, or counsel for the Tool Company was to provide satisfactory proof that he was authorized to accept service of the subpoena on behalf of Howard R. Hughes.

Pretrial Order, September 21, 1962

Interrogatories were framed by the plaintiff and served upon the Tool Company which thereafter were amended by order of the court dated July 12th, 1962. Subsequently, by order dated July 26th, 1962, the time for the Tool Company to answer the interrogatories was fixed for August 27th, 1962. Counsel for the Tool Company then served and filed with the court a document which he asserted gave him the authority to accept service of the witness subpoena on behalf of Howard R. Hughes. At this time the court reserves for future determination any question raised by the plaintiff regarding the authenticity of that document.

Pursuant to the document filed with the court, Chester C. Davis, counsel for the Tool Company, accepted service of a witness subpoena on behalf of Howard R. Hughes on September 6th, 1962. That subpoena was issued out of the United States District Court for the Southern District of California upon the notice by the attorneys for the plaintiff served upon Chester C. Davis, which stated that the deposition of Howard R. Hughes as a witness would be taken at the United States District Courthouse for the Southern District of California in Los Angeles on September 24th, 1962. The return of the marshal, indicating service upon Chester C. Davis in Los Angeles, was accompanied by an affidavit by Mr. Davis stating that he had been authorized in writing by Howard R. Hughes to accept such service.

Pursuant to the order of the court dated July 12th, 1962 and the suggestion made by the court at a hearing held on September 6th, 1962, the plaintiff moved before the Special Master on September 15th, 1962 for permission to suspend the taking of the depositions by the Tool Company in order to permit plaintiff to commence taking the deposition of Howard R. Hughes on September 24th, 1962, and that the suspension of the taking of depositions by the Tool Com-

Pretrial Order, September 21, 1962

pany be continued until the deposition of Howard R. Hughes was completed. The Special Master denied the application of the plaintiff.

However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court.

On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September

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15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master.

The Special Master has presided over the deposition proceedings practically since their inception. The propriety of plaintiff's application is peculiarly within his competence. He is aware of the court's views contained in the last paragraph of the order of July 12th, 1962. Plaintiff has not made an adequate showing at this time that the ruling of the Special Master within this framework is in error. I approve and affirm the ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R. Hughes on September 24th, 1962 to the extent that the return date of September 24th, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this court to October 29th, 1962 at the same time and place. The Tool Company may apply to the Special Master on October 22nd, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes.

Chester C. Davis is directed to notify Howard R. Hughes of this determination before 9 p.m. tonight, Eastern Daylight Time, both by telephonic communication and by mailing a copy of this order air mail special delivery to Howard R. Hughes.

So ORDERED.

Dated: New York, N. Y.

September 21, 1962

/s/ CHARLES M. METZNER
U. S. D. J

Pretrial Order, January 10, 1963

[Doc. 144]

[CAPTION]

61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held on January 9th, 1963 to consider various matters brought to the court's attention by notices of appeals from rulings of the Special Master. These matters are disposed of as follows:

1. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, 1963 is withdrawn by counsel for TWA pursuant to an application filed January 8th, 1963.

2. The appeal by Hughes Tool Company dated January 3rd, 1963 seeking to review an order of the Special Master dated December 28th, 1962 denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. by Wadsworth is denied and the ruling of the Special Master is affirmed. The court adopts the statement of the Special Master appearing on page 11 of the transcript of proceedings before the Special Master dated December 28th, 1962, which states:

"I do not think it [the depositions of Sessel and Wadsworth] would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counter-claims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

Pretrial Order, January 10, 1963

The court has previously indicated that priority of deposition is not sacrosanct, and even without the adoption as of July 1st, 1962 of rule 4 of the Civil Rules of this district the court has the power to alternate the taking of depositions by the parties.

During a ten-month period the defendant has conducted over 80 days of depositions of the plaintiff, which have consumed over 10,000 pages of testimony. It will have substantially completed the deposition of the plaintiff this month with the testimony of Cocke and Leslie. It has then scheduled the depositions of other witnesses, including Sessel and Wadsworth, which can consume a very long period of time. The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances. The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served

Pretrial Order, January 10, 1963

on October 11th, 1962 and the further interrogatories served on November 13th, 1962.

The court concurs in the ruling of the Special Master contained in his order of December 28th, 1962 clarifying his order of October 25th, 1962, directing that Howard R. Hughes appear on February 11th, 1963 for deposition in Los Angeles. The return date of the subpoena served on September 6th, 1962 as adjourned by order of this court dated September 21st, 1962 and the notice to take deposition are adjourned to February 11th, 1963 at the same time and place. The provisions of the order of this court dated September 21st, 1962 are reaffirmed and reiterated, and Mr. Davis is directed to notify Howard R. Hughes of the directions of the court contained in this order by telephonic communication and by written communication to be made and sent by 5 p.m. on January 11th, 1963.

3. The motion by Hughes Tool Company, pursuant to rule 16 of the Federal Rules of Civil Procedure, to authorize the Special Master to conduct pretrial conferences, with recommendations to the court for the form and terms of a pretrial order defining and limiting the legal and factual issues in this case, is denied without prejudice to a renewal 30 days after the completion of the deposition of Howard R. Hughes.

4. The appeal by Hughes Tool Company dated September 19th, 1962 from an order of the Special Master made on September 15th, 1962 which requires Hughes Tool Company to produce for inspection and copying by opposing counsel, prior to a further definition of the issues, the documents with respect to which Hughes Tool Company claims attorney-client privilege is denied and the order of the Special Master is affirmed.

Pretrial Order, January 10, 1963

A reading of the briefs and the oral argument would indicate that the application under advisement is in fact a reargument of the order of this court dated July 24th, 1962. At that time the court indicated that it had reviewed the opinion of the Special Master which appeared in the transcript at pages 4361-4391 and the letters of the Special Master dated May 2nd, 1962 and May 3rd, 1962. The court concurred with the opinion of the Special Master and directed that if there were any specific documents concerning which Hughes Tool Company desired specific rulings they should be submitted to the Special Master.

At pages 122 et seq. of the transcript of September 15th, counsel for the Hughes Tool Company stated that he had made available to the Special Master the documents concerning which the defendant was asserting the attorney-client privilege. Counsel went on to state that the documents were made available for a ruling by the Special Master not as to whether they would be normally covered by the attorney-client privilege, but "whether or not the attorney-client privilege had been waived." He then went on to say at page 124 that:

"What is developing is simply the question of the procedure to be followed in obtaining rulings of the Special Master with respect to individual documents, applying the principles of law announced by the Special Master and affirmed by Judge Metzner, and the only area which I am aware constitutes a difference of opinion, perhaps, is whether those documents are to be produced at this time on the ground that prior to this time there had been a waiver of the privilege."

Documents heretofore submitted to the Special Master shall be made available to all parties by noon on January 14th, 1963. If there are any additional documents to which the defendant Hughes Tool Company asserts a non-waived

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attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14th, 1963 and a list thereof furnished at the same time to counsel for all parties.

5. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master denying its motion to quash or strike interrogatories served by Tooleo on October 11th, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

6. The appeal by TWA dated December 20th, 1962 from an order of the Special Master appearing in the transcript of the proceedings before the Special Master on December 3rd, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

So ORDERED.

Dated: New York, N. Y.
January 10, 1963

/s/ CHARLES M. METZNER
U. S. D. J.

Pretrial Order, January 19, 1963

[Doc. 146]

[CAPTION]

61 Civ. 2324

PRETRIAL ORDER

Defendant Hughes Tool Company (referred to as Toolco) has moved for an order pursuant to rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories or, in the alternative, that if such relief pursuant to rule 30(b) is denied that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to rules 12(b) and 56(b) be brought on for hearing and determination. The motion further requests that the order of this court dated January 10th, 1963 be stayed until the determination of the motions to dismiss or for summary judgment.

This case was assigned to me for all purposes by the Chief Judge on August 31, 1961 pursuant to rule 2 of the General Rules of this court. After the disposition of several preliminary matters concerning production of documents and scheduling, Toolco commenced taking depositions of the plaintiff in February 1962. The parties requested that a Special Master be appointed to supervise the deposition proceedings and the court designated J. Lee Rankin for this purpose. Since that time over 80 sessions have been held and over 10,000 pages of testimony have been taken.

Sometime prior to July 12th 1962 the Special Master indicated his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was reached. Without detailing the subsequent events, all of which are set forth in

Pretrial Order, January 19, 1963

the order of this court dated September 21, 1962, the problem seemed to have been resolved when counsel for Toolco filed with the court a document purportedly signed by Howard R. Hughes authorizing said counsel to accept service of a witness subpoena on behalf of Howard R. Hughes. Plaintiff attacked the authenticity of this authorization. Counsel for Toolco flew to Los Angeles and accepted service of a witness subpoena from a Deputy United States Marshal for the Southern District of California at 7 a.m. (10 a.m. New York time) on September 6th, 1962, the morning of the hearing before this court on plaintiff's claim of forgery. The disposition of that matter has been held in abeyance. The subpoena provided for the appearance of Howard R. Hughes at the United States District Courthouse in Los Angeles on September 24th, 1962.

Subsequently, plaintiff moved before the Special Master to suspend the taking of depositions by Toolco in order to permit plaintiff to commence taking the deposition of Hughes pursuant to the subpoena. The Special Master denied this application and this court affirmed that ruling by its decision and order of September 21st to the extent that the deposition was adjourned to October 29th, 1962. Leave was given Toolco to make application to the Special Master for a further adjournment if in its opinion this was necessary. Such application was made on October 22nd, 1962 and the Special Master adjourned the return date of the subpoena to February 11th, 1963. The court has affirmed that ruling. During the months of September, October, November and December, Toolco has proceeded with its deposition of the plaintiff.

On December 28th, 1962 defendant Toolco made application to the Special Master to take the deposition of two additional witnesses which if granted would have necessitated a further adjournment of the Hughes deposition. The Spe-

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cial Master denied this application and the ruling of the Special Master was affirmed by the court in its decision and order of January 10th, 1963.

Counsel for Toolco has repeatedly indicated since the assignment of this case to me that motions theretofore made to dismiss the complaint and for summary judgment would be noticed for argument, but agreed that they were premature.¹

The present motion appears to be another attempt to put off the deposition of Hughes. As I stated in my order of January 10th,

"The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

"Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press, for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962."

¹ Transcript of pretrial conference September 6, 1961, pp. 25-28, 40-41.

Transcript of pretrial conference October 2, 1961, pp. 10, 23.

Transcript of pretrial conference February 23, 1962, pp. 58-59.

Transcript of pretrial conference September 19, 1962, p. 39.

Transcript of pretrial conference January 9, 1963, p. 17.

Pretrial Order, January 19, 1963

Because of the issues involved in this litigation and the nature of the proof sought from Hughes, the use of written interrogatories would be a wholly unsatisfactory procedure. Contemplated answers to specific interrogatories may not be forthcoming, which would render meaningless subsequent questions. Answers given might suggest further questions to sufficiently probe for the facts, but such questions would not appear in the interrogatories. None of the grounds asserted or implied are sufficient in this case to justify proceeding initially by written interrogatories. Consequently, the first branch of the motion, seeking relief pursuant to rule 30(b), is denied.

As I have indicated above in the quotation from the January 10th order, it would appear to the court that the case is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment. The motion papers filed before the assignment of the case pursuant to rule 2, which I assume are the motions Toolco is now bringing on for hearing, were predicated upon the grounds that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the subject matter of the action, and that there is no genuine issue as to any material fact. More specifically, it is stated that the transactions complained of were subject to and approved by orders of the CAB under section 408 of the Federal Aviation Act of 1958 and therefore pursuant to section 414 of that act there is an exemption from the operations of the antitrust laws, that if there is any question as to the scope or the enforcement of the above orders, they are matters within the exclusive jurisdiction of the CAB, and finally that the activities of Toolco subsequent to 1960 which are alleged to have constituted a

Pretrial Order, January 19, 1963

malicious and willful interference with TWA's business were taken on advice of counsel.

The court, of course, cannot prevent defendant Toolco from pressing these motions at this time. However, since counsel for the defendant has been contemplating the motions for more than a year and a half, he obviously does not need the six weeks which he requests for the preparation of his papers. Counsel for plaintiff has indicated that he will cooperate in relieving defendant of a schedule with regard to motions pending in a companion action in Delaware, so as to free counsel for the defendant to devote his efforts entirely to these motions. As I indicated to counsel in an informal conference on January 16th, I will fix the date of February 1st, 1963 at noon for defendant to file all additional papers in support of its motions, and plaintiff shall be given until noon of February 8th, 1963 for answer. If upon reading defendant's papers the court is of the opinion that there is doubt as to its preliminary observations that these motions are premature, it will advise counsel of a short adjournment of the deposition of Hughes. In the meantime, this deposition shall go forward as ordered, on February 11th, 1963.

The order of January 10th will not be stayed pending a determination of the motions to dismiss and for summary judgment. The documents which the court has directed be turned over to the plaintiff shall be furnished as provided in the order of January 10th, 1963 except that the date of January 14th, 1963 as fixed in paragraph 4 of that order is amended to read "January 22nd, 1963".

At the hearing before the Special Master on January 17th, counsel for defendant was reluctant to indicate whether he desired to hold the deposition at some place

Pretrial Order, January 19, 1963

other than the United States Courthouse in Los Angeles. As counsel for the plaintiff and the additional defendants have indicated, they are amenable to cooperate in any reasonable request of counsel for the defendant, but it is necessary that advice of a change be given so that necessary arrangements can be made. Consequently, unless counsel for the defendant indicates by noon on January 22nd, 1963 a desire to change the designated place, the deposition shall proceed in the United States Courthouse in Los Angeles.

So ORDERED.

**Dated: New York, New York
January 19, 1963**

**/s/ CHARLES M. METZNER
U. S. D. J.**

**Opinion and Order of Special Master,
January 22, 1963,
Appendix C, Annexed to Affidavit of Bruce Bromley,
February 15, 1963**

[Doc. 179A]

[CAPTION]

[APPEARANCES]

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Defendants Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty moved for an order pursuant to Rule 34 of the Federal Rules of Civil Procedure directing the defendant, Hughes Tool Company, to produce and to permit said additional defendants to inspect and copy each of the documents designated in the schedule annexed to the affidavit of John R. Hupper and attached to said motion, subject to whatever protective relief under the protective order of March 21, 1962 the Special Master might deem proper. In the schedule referred to the documentary evidence requested consisted of various writings in the possession, custody or control of Hughes Tool Company and any concern or person associated at any time with Hughes Tool Company, including its sole stockholder, pertaining to the period from 1939 to date and relating directly or indirectly to:

(a) Dividends or other payments made to Toolco's stockholder or any discussions or decisions made as to whether or not to pay dividends to Toolco's stockholder.

(b) Any accumulation or retention of earnings or profits by Toolco.

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(c) Any conferences or communications with any official or agent of the Internal Revenue Service or any other government official, agent or agency relating to the payment of, or failure to pay, dividends by Toolco or to the retention or accumulation of earnings or profits by Toolco.

(d) Any penalty, assessment or deficiency, or any possibility of such, made by, or discussed with, the Internal Revenue Service or any governmental official, agent or agency, by reason of any accumulation or retention of taxable earnings or profit by Toolco.

(e) Any justification made or considered by Toolco for the retention or accumulation of taxable earnings or profits with respect to Section 531 of the Internal Revenue Code (Section 102 of the 1939 Code).

(f) The desirability of financing Trans World Airlines, Inc. ("TWA") or Northeast Airlines, Inc. ("NEA") equipment needs through debt or equity from the standpoint of Toolco, TWA, NEA or any other person.

(g) The desirability or undesirability of TWA or NEA maintaining any particular debt-equity ratio or any particular capital structure, from the standpoint of Toolco, TWA, NEA or any other person.

(h) The desirability or effect of any TWA or NEA dependency upon Toolco's financial resources or the financial effect of permitting TWA or NEA to be dependent upon Toolco's financial resources, from the standpoint of Toolco, TWA, NEA or any other person.

(i) The depreciation taken or available to be taken by Toolco or TWA or NEA for internal accounting, income tax or any other purpose on any flight equipment acquired or to be acquired.

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(j) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between TWA and Toolco dated July 21, 1960 and the computations reflected therein.

(k) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between Toolco and TWA dated December 29, 1960 and the computations reflected therein.

(l) The Final Accounting and Debenture Purchase Agreement, including Exhibit A thereto, between Toolco and TWA dated December 30, 1960 and the computations reflected therein.

(m) The letter agreement dated May 9, 1960 between Toolco and TWA entitled "Purchase of Boeing Model 707-131 and 707-331 Jet Aircraft and Convair Model 880 Jet Aircraft".

(n) The determination of the amount of rental payments to be made by TWA to Toolco for Boeing 707-131's and Boeing 707-331's leased by Toolco to TWA in 1959 and 1960.

(o) The method of accounting for all such rental payments internally, for income tax or for any other purpose.

(p) Any and all moneys borrowed by Toolco and the interest rate thereon.

(q) Any and all interest or interest factors charged to TWA by Toolco and the method used for computing such interest or interest factors.

(r) Any capital gains realized by Toolco on the sale of any flight equipment.

(s) Any gain of any sort realized by Toolco on the sale of any flight equipment.

(t) The desirability and financial effect of any method of selling or purchasing or financing or leas-

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ing any aircraft by Toolco or TWA or NEA, from the standpoint of Toolco, TWA, NEA, or any other person.

(u) All payments made by Toolco to manufacturers or others in connection with the procurement of aircraft.

(v) All Toolco Federal Income Tax Returns, including all supporting schedules, for the years 1961 and 1962.

(w) All Toolco financial statements for 1961 and its quarterly statements for 1962, including all supporting schedules.

In accordance with the practice in this case, the plaintiff and the additional defendants Irving Trust Company and Ben-Fleming Sessel, Dillon, Read & Co. Inc. and Charles C. Tillinghast, Jr., joined in the motion and requested that if such documents were required to be produced under the motion for such other additional defendants, that they also be required to be produced for them and that they be permitted to inspect and copy each of the documents designated in the schedule annexed to the affidavit of John R. Hupper.

In support of the motion, Mr. Hupper sets forth in his affidavit that the documents requested are directly related to the allegations set forth in Toolco's counterclaims and the fact that such documents probably exist recently came to the attention of the moving defendants through a preliminary study of the Toolco's financial statements and income tax returns previously produced for inspection and copying pursuant to orders of the Court and the Special Master.

The proof further claims that a study of such tax returns and financial statements caused it to appear that Toolco

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may have taken advantage of its dominance over the affairs of TWA to profit at TWA's expense and to arrange transactions between itself and TWA so as to achieve tax and other benefits for itself at TWA's expense, and that proof of such facts would controvert the allegations of the counterclaims to the effect that Toolco's participation in the financial arrangements involving TWA were designed to benefit TWA and were in its best interest. Mr. Hupper also asserted that such proof would confirm the justification for the moving defendants' unwillingness to lend many millions of dollars to finance the acquisition of aircraft for use by TWA without assurances that TWA would control such aircraft and that TWA would have a management in which said defendants had confidence.

An example given is the sale by Toolco to TWA on December 30, 1960 of 19 Boeing 707 aircraft, which TWA had been forced to lease from Toolco at rates of \$2500 per day and more, and in some instances for more than a year, as a result of Toolco's previous refusal to agree to the consummation of arrangements whereby TWA might purchase such aircraft. It is also asserted that Toolco, through complex financial arrangements completed on December 30, was able to profit directly from the sale of the Boeing aircraft to TWA in an amount in excess of \$11,000,000. .

Mr. Hupper also states that it appears from Toolco's tax returns that it was able to reap substantial benefits through its ability to take for tax purposes accelerated depreciation on the 19 Boeing 707 aircraft leased by it to TWA, and that because of Toolco's insistence on a leasing program TWA was deprived of the benefits of such depreciation. It is further stated that TWA was finally permitted to purchase the aircraft from Toolco in December 1960, but at that time depreciation was credited to TWA in calculating the pur-

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chase price on a straight-line basis, rather than in accordance with the accelerated computation employed by Toolco.

Mr. Hupper also asserts that it appears in connection with the sale of jet planes to TWA that Toolco was able for tax purposes to convert substantial amounts of ordinary income into capital gain, in part by offsetting depreciation charges against Toolco's ordinary income while the Tool Company was leasing the planes to TWA and then reducing Toolco's cost basis by the amount of such depreciation when calculating its capital gain on the sale of the planes and a like procedure was followed in converting interest charges to capital gains. It is asserted that these items of capital gain resulting from such action appeared to involve millions of dollars.

It is also stated in the affidavit that according to the evidence available Toolco has for many years arranged TWA's equipment transactions so as to achieve substantial tax savings for it irrespective of TWA's best interest, and an example is given from the testimony of Mr. Rummel regarding Mr. Hughes' insistence that a contract for a certain Lockheed 1694 aircraft be completed in December 1954 over the objection of Mr. Rummel that specifications for the aircraft had not been sufficiently developed to make a firm contract advisable.

It is also asserted that Toolco's financial statement for 1954 shows a \$17,000,000 payment made by it to Lockheed on account of such aircraft, and that since the net income of Toolco, after taxes, for 1954 was in excess of \$20,000,000, the payment of the \$17,000,000 in that year was for the purpose of obviating Mr. Hughes' Section 102 tax problem and that except for such arrangements, possibly to the detriment of TWA, very substantial penalties might well have been assessed against Toolco under Section 531 of the Internal Revenue Code (Section 102 of the 1939

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Code). Mr. Hupper states that although it is impossible from the limited information now available to ascertain the exact amount of such benefits which Toolco obtained from this and similar transactions involving TWA's equipment needs, the total may well exceed \$25,000,000 as it now appears.

It is also asserted that the detailed information requested in the schedule is of crucial importance in connection with the forthcoming examination of Mr. Hughes scheduled for February 11, 1963.

Toolco objected to the granting of the motion on two grounds; one that until the court has ruled upon its motion to dismiss the complaint on the ground of lack of jurisdiction and other grounds described in its motion to dismiss, and until the court ruled upon the motion to dismiss the counterclaims made by the plaintiff, which latter motion is now under submission, the motion for production of these documents should be denied.

The motion was argued at length before the Special Master on January 17, 1963 and at that time after extended argument, the Special Master took a submission of the motions and opposition thereto and stated that he would rule upon them after Judge Metzner had decided the questions then before him. These were a motion in the alternative by Toolco for an order pursuant to Rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories, or in the alternative that if such relief pursuant to Rule 30(b) was denied, that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to Rules 12(b) and 56(b) be brought on for a hearing and determination, and that the order of the court dated January 10, 1963 requiring certain documents to be turned over to the

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plaintiff be stayed until the determination of the motions to dismiss or for summary judgment.

On January 19, 1963 Judge Metzner ruled on the aforesaid motions of Toolco and denied the application to take the deposition of Howard R. Hughes on written interrogatories, agreed to taking a submission of the motion to dismiss and a motion for summary judgment in accordance with the schedule set for the 1st of February, and denied the application to stay the order of January 10th for the production of documents, except that he modified the date of January 14th to be extended to January 22nd.

The Special Master finds that good cause has been shown for the production of the documents requested and that the motion of the respective parties should be sustained and the documents described in the schedule attached to the motion be produced for inspection and copying by the plaintiff and all of the additional defendants.

It is quite apparent that the documentary evidence requested is relevant to the inquiries in this case. The claim that Toolco's 102 problems and the profits that Toolco obtained by reason of its relations with TWA in the procurement and financing of equipment is not a novel contention in this case. It was asserted a number of months ago by the plaintiff in these proceedings.

It is also obvious that the materials now requested might be important and quite necessary in illuminating, explaining and supporting information either partially or fully set forth in the financial statements and the income tax returns of Toolco that Judge Metzner ordered Toolco to produce in his order of December 18, 1961, calling for their production for March 15, 1962.

While it is recognized that the effort to produce such information by the Tool Company at this time is a burden,

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it is not under all of the circumstances an unreasonable one and in fact in view of the importance of such materials to this litigation, it is found that the requirement to produce it is in fact reasonable.

The importance of having the requested documentary materials prior to the taking of the deposition of Mr. Hughes is obvious. It would appear that employees and counsel at Houston, Texas, who have for many years represented Toolco generally, as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

Concerning the objection that the production be denied until the disposition of the motion to dismiss the complaint or for summary judgment and the motion to dismiss the counterclaims is ruled upon, such suggestions do not appear to have validity, and especially so on consideration of the rulings of the court and the practice that has been followed of requiring production in this litigation. Such rulings and practice demonstrates the position of the court throughout to have been to give each and all parties every reasonable opportunity to secure documentary evidence that might be relevant or lead to relevant evidence either for the party taking depositions at the time or to those not taking depositions to prepare themselves for the time when they would have their turn. There is nothing about the motion to dismiss the complaint, or for summary judgment, or for a motion to dismiss the counterclaims that should interfere with such an approach to the development of the essential facts in this litigation.

The Special Master back as far as October 25, 1962 in setting the deposition of Howard R. Hughes over to February 11, 1963 referred to the fact that there would be ample

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opportunity in the interim for Toolco "to present whatever motions it cared to to the court with regard to the jurisdiction of the court over the subject matter and elements of primary jurisdiction or other legal issues of that character * * *". In view of the time that has expired since that date the presentation now of such motions should not be allowed to interfere with the taking of Mr. Hughes deposition on the date assigned and the opportunity of counsel in examining Mr. Hughes to be fully informed by such material as is described in the schedule attached to the motions which is under the custody and control of the Tool Company or other persons described in said motion.

It is, therefore, ordered that subject to and in accordance with the protective order of the Special Master of March 21, 1962, the motion is sustained and the defendant Hughes Tool Company is ordered to produce the documents described in the schedule attached to the motion on January 30, 1963.

It is further ordered that any review of this order be taken by filing papers in the United States District Court for the Southern District of New York before 5:00 P. M., January 25, 1963.

Dated: New York, New York

22nd day of January, 1963.

J. LEE RANKIN
Special Master

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**Exhibit A to the Affidavit of John F. Sonnett
dated February 1, 1963**

[Doc. 166]

**EXHIBIT A 1
CREDIT MEMORANDUM**

**Los Angeles Main Office #600
June 4, 1957**

**HOWARD R. HUGHES
TRANS WORLD AIRLINES**

On June 4, 1957 I talked over the telephone with Ben-Fleming Sessel, Senior Vice President of Irving Trust Company, New York. I told Sessel that we had received from one of his associates a letter relating to the TWA matter, copy of which had been sent to Noah Dietrich and we wondered what the situation was in that respect. He said that there had not yet been any official announcement regarding Dietrich and accordingly his bank was simply following instructions contained in the loan agreements.

An official of the National Bank of Commerce of Houston had become aware of a change in signature cards, leaving Dietrich out and had talked with Sessel in an effort to determine what was going on.

Sessel said that Dietrich was in New York and would have dinner with him on the 5th. Sessel felt that the conversation was to relate to personal rather than official matters. Howard Hughes has told Sessel not to do anything about Dietrich for the time being. Dietrich is still on the TWA board but according to Hughes, "not for long."

Sessel has passed along to Hughes all of the things that he, Sessel, and we have agreed upon concerning the future

Exhibit A 1

handling of the account as to which Hughes has requested that the matter be left to him. (Sessel comments, "Whatever that means".)

Sessel said that the TWA offering would go through and and that while he would much prefer having a definitive firm take-out or firm guarantee by Hughes Tool on our \$10 million six months loan to TWA, he feels that the over-all situation is such that Hughes "will have to feel an obligation" to see that the \$10 million is paid.

Sessel says that Hughes has in mind buying some Viscounts to the tune of \$15 million for the planes plus about \$7 million for spare engines and parts. The purchase might be by Hughes Tool Company or might be by TWA with the Hughes Tool Company guaranteeing. If the purchase were made it would be made under the British Government arrangement whereby a purchaser pays 20% down and credit is given for the remaining 80% if properly supported, and in this case, the support could be the Hughes Tool Company guarantee. Hughes asked Sessel whether the banks would be interested and Sessel's reply was that Hughes should get TWA's present deal out of the way first and the banks would not be interested in talking about anything until it is settled.

Sessel raised the point with which we agreed that \$22 million probably would not buy enough planes of a type completely new to TWA to justify the setting up of servicing facilities. Hughes apparently wants to replace TWA's Martins which are said to be substantially worn out.

Exhibit A 1

HOWARD R. HUGHES
TRANS WORLD AIRLINES

June 4, 1957
Page 2.

We discussed the so-called "special loan" to Howard Hughes which revolved around Hughes' contract with RKO Teleradio. It will be recalled that we had told the Irving Trust Company that we would be happy to participate in the loan provided Howard Hughes was entirely agreeable to it. Sessel told me today that we had not been given a piece of the loan *because Hughes did not want us in on it*. It will be recalled that a part of this deal contemplated Hughes delivering prints of the film "Jet Pilot" to Teleradio by June 1. Sessel said that on Friday, May 31, someone with RKO-Pictures, he didn't know exactly who, telephoned to Technicolor and told them not to release prints of "Jet Pilot". It will be remembered that Hughes had given his word that this picture would be delivered and that RKO Teleradio had said that unless the picture were delivered they wouldn't make payments on the contract. Sessel concluded that there is a "clear breach of faith" somewhere.

I asked him whether this conduct of Hughes might bear out Dietrich's statement that "Hughes is a bad boy" to which Sessel replied that he thought not.

/s/ ROBERT L. GORDON
Vice President

cc: Keath L. Carver
T. C. Deane
R. G. Hawley

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EXHIBIT A 2

March 11, 1958

MR. RADU IRIMESCU

FLOYD B. ODLUM

Gardner, Austin and Lane were here over the weekend and we discussed proposals A, B and C. I agreed to go along with proposal B, if approved by the Directors, including yourself, and Stretch.

However, I pointed out that Hughes had repeatedly said he would make some concession to help us if we could pick up all or a substantial part of the Viscount planes and asked whether the Viscounts, at least for service from Washington north, might not be a better deal, if obtainable on lease, than proposal B with the Convairs. Gardner, Austin and Lane made calculations and came up with the belief that figure-wise the Viscounts would give us a much better showing and of course from the standpoint of putting us over as a first rate company would be much better than the Convairs.

Since then I have talked to Howard Hughes and he indicated that he very likely could find a buyer of the planes who would rent them to Northeast. Convair indicated to Gardner and Austin that they also could probably find a buyer for these Viscounts who would lease them to Northeast, conditioned of course in this case on our ordering 880's. I asked Convair this morning to forget a followup of this for a few days because Hughes is working on it and asked that for a few days we not discuss it with anybody, including the British and I would not want to have wires crossed just at this time.

F. B. O.

cc: MR. GARDNER

A-147

EXHIBIT A 3

Show to Stretch.

Northeast

NEA—Viscounts

Irimescu—transmitted by phone

3/17/58

Hughes told me today he progressing well with Viscount lease matter and expects to reach point by end this week where he can put principal who is to buy planes in direct touch with Northeast for preparation of lease.

FLOYD ODLUM

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EXHIBIT A 4

THE BARCLAY
111 East 48th Street
New York

March 18, 1958

Dear Floyd:

Jim, Rem and I have just come from a talk with Radu during which we talked to you about training costs on Viscounts. This was part of a general discussion about what course to follow.

After leaving Indio we called at San Diego, Lockheed and went up to Boeing. The primary purpose of our trip to Boeing was to check up on figures we had been given and give Austin a chance to see the airplane.

On the way home we put together various possible combinations and the enclosed projections are the result.

Yesterday Bristol called to say the Britannia would be certificated April 7th. That is reason for the Bristol projections. I can only say that all three of us were very impressed by Boeing's progress, their airplane and figures based on real experience. Much as it may hurt I'm sure these airplanes are going to win almost immediate acceptance. If I had my choice of all deals it would be early delivery of 3 707-150's even if we don't increase our fleet at all between now and July, 1959. I think Jim still thinks we should do a Convair 240 lease deal in the interim.

We are waiting anxiously for word from Mr. Hughes reference the Viscounts. Since financing the Boeing looks impractical at moment the Viscount is second choice.

Many thanks again for your hospitality when we were in Indio.

Sincerely,

GEORGE GARDNER

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EXHIBIT A 5

7-28-59

Carver 7-28-59 I called at his request 8:01
Pan Am deal closed. Has money—Boeing said to have
consented.

H.H. Hasn't paid Boeing

H.H. Doesn't intend to pay Boeing—feels Boeing has
held him up.

H.H. feels he has done a better job moneywise than if
he had done the aircraft deal.

Convair has agreed voluntarily to reduce order from 30
to 20 & return deposits provided he will discontinue nego-
tiations with Capital Air Lines on 6 planes.

Hughes says Sessel is his representative & has severed
his connection with Irving—(all news to us.)

B OF A.—GORDON

EXHIBIT A 6

July, 1959

NORTHEAST AIRLINES, INC.
Logan International Airport
Boston 28, Mass.

Re: Purchase by Northeast of three (3)
Convair Model 880 jet aircraft.

Gentlemen:

This letter will evidence the recent discussions between Hughes Tool Company ("Hughes") and Northeast Airlines, Inc. ("Northeast") undertaken with a view toward the acquisition by Northeast, either directly from Hughes or from General Dynamics Corporation (Convair Division) ("Convair"), of three (3) of the Model 880 Convair aircraft now covered by the Purchase Agreement between Hughes and Convair dated September 10, 1956, as amended.

Hughes does hereby indicate its willingness to transfer to Northeast, either in the form of an assignment to Northeast of Hughes' contractual rights with Convair under the aforementioned purchase agreement insofar as same pertain to the three Model 880 aircraft hereinafter identified, or in the form of a sale of the aircraft upon or subsequent to the delivery thereof by Convair to Hughes. Northeast, by its acceptance of this letter of intent, shall thereby evidence its willingness to acquire said three (3) Model 880 aircraft. The respective obligations of Hughes and Northeast to sell and purchase said aircraft shall, however, be subject to the parties' agreement to a form of definitive contract, which contract the parties shall endeavor to negotiate and execute within thirty (30) days next following Northeast's acceptance of this letter of intent, and which contract shall contain, among other necessary provisions, substantially the following terms:

Exhibit A 6

1. *Identification of Aircraft.* The three (3) Model 880 Convair aircraft (hereinafter referred to as "The Aircraft") shall be those now designated by Convair as the 23rd, 26th, and 30th such aircraft covered by the Purchase Agreement between Hughes and Convair dated September 10, 1956 (hereafter referred to as the "Convair Contract"), and which are required by the provisions of the Convair Contract to be delivered to Hughes during the months of August and September, 1960.

2. *Configuration.* The Aircraft shall conform in every respect to the Specifications which prescribe the configuration and physical characteristics of such of the aircraft covered by the Convair Contract as, prior to delivery to Northeast of The Aircraft, shall have been delivered to Trans World Airlines, Inc. ("TWA") by Hughes or by Convair; provided, however, that in the event of any changes to the Specifications made by Hughes or TWA, pursuant to agreement with Convair, subsequent to the date on which Northeast's obligation to purchase The Aircraft becomes firm and unconditional, such changes shall not, without the consent of Northeast, be embodied in The Aircraft unless and except to the extent that Convair shall so require.

3. *Price.* The price of The Aircraft shall depend upon the form in which The Aircraft or the rights thereto are transferred from Hughes to Northeast, as follows:

(a) If the Hughes-Northeast transfer shall be effected by the assignment of Hughes' contractual rights relative to The Aircraft, the consideration for such transfer shall be the sum of the following:

(i) Northeast's assumption of all obligations and liabilities of Hughes in favor of Convair applicable or properly allocable to The Aircraft,

(ii) the payment by Northeast to Hughes of the sum of \$2,626,650 (representing the install-

Exhibit A 6

ment payments heretofore made by Hughes to Convair with respect to The Aircraft),

(iii) interest on said sum of \$2,626,650 at the rate of 5% per annum from the date of Hughes payment of the aforesaid mentioned sum to Convair (such amount of interest being hereinafter referred to as "Capitalized Interest"),

(iv) such portion of Hughes reasonable expenses incurred in administering the Convair Contract as is directly attributable or properly allocable to The Aircraft (hereinafter referred to as "Hughes' Administrative Expenses"),

(v) in the event by reason of the application of the de-escalation clause of the Convair Contract the price per airplane to Northeast is less than \$3,733,000, an amount equal to three times that by which \$3,733,000 exceeds the price per airplane to Northeast.

(b) If the Hughes-Northeast transfer is effected by a sale from Hughes to Northeast of The Aircraft upon or subsequent to delivery thereof from Convair to Hughes, the consideration for such transfer shall be the payment by Northeast to Hughes of the sum of the following:

(i) An amount equal to the total purchase price paid by Hughes to Convair for The Aircraft, but in no event less than \$3,733,000 per airplane;

(ii) the Capitalized Interest; and

(iii) Hughes Administrative Expenses.

4. *Payment.* In the event that all other amounts (e.g. Capitalized Interest and Hughes' Administrative Expenses) owing by Northeast to Hughes are paid in cash at the time of the execution of the assignment by Hughes to Northeast of the applicable part of the Convair Contract, or at the time of the delivery by Hughes to Northeast of The Aircraft, whichever

Exhibit A 6

the case may be, and in the further event there shall not then be due and unpaid any obligations owing from Hughes to Convair with respect to The Aircraft, Hughes will agree that Northeast may defer its reimbursement to Hughes of a substantial part (the exact amount to be set forth in the definitive contract) of Hughes' \$2,626,650 down payment to Convair for The Aircraft. The amount of such deferred reimbursement shall be evidenced by a promissory note executed by Northeast in favor of Hughes and delivered concurrently with the payment of the cash consideration. Said note shall provide for such term, interest rate, and number and frequency of installments as may be agreed upon between Hughes and Northeast and consented to by The Chase Manhattan Bank. Hughes will consent to such reasonable subordination provisions as may be required by The Chase Manhattan Bank, to the end that the repayment of Northeast's note to Hughes may not interfere materially with Northeast's repayment to The Chase Manhattan of the loan or loans arising under the Credit Agreement of September 30, 1955, as amended July 15, 1958.

5. *Consent of Third Parties.* The definitive contract shall by its own terms provide that the effectiveness thereof shall be made expressly subject to and conditioned upon such consents as may be necessary from the Civil Aeronautics Board, Convair, The Chase Manhattan Bank, and Irving Trust Company as trustee under those certain Equipment Trust Certificates issued by Northeast pursuant to Agreement of July 15, 1958.

6. *Necessary Extension of Northeast's Route Certificate.* The definitive contract shall provide that same may be terminated by either party thereto without obligation or liability to the other at any time subsequent to December 15, 1959, if on or before December 15, 1959 there shall not have been issued and become final and unappealable an order of the Civil Aeronautics Board, or such other governmental agency then having jurisdiction in the premises, by

Exhibit A6

which Northeast is granted, with respect to its route between New York, New York and Miami, Florida, an appropriate Certificate of Public Convenience and Necessity which shall be either (a) permanent, or (b) effective on a temporary basis through a date not earlier than November 1, 1968.

7. *Customer Furnished Equipment and Related Spares.* Northeast will purchase from Hughes, in addition to The Aircraft, such spare parts, spare engines, and items of equipment which constitute "Customer Vended Equipment" under the terms of the Convair Contract, as shall, prior to the date on which Northeast's obligation to purchase The Aircraft becomes firm and unconditional, have been purchased by Hughes for installation in or in support of The Aircraft. The price to be paid by Northeast for such related equipment shall be an amount equal to Hughes' cost thereof plus interest at the rate of 5% per annum calculated from the date of each of respective outlays therefor to the date of payment by Northeast.

If the foregoing basic terms appear to be generally in accordance with our prior discussions, and if Northeast desires to continue negotiations for a definitive contract along the lines hereinabove set forth, kindly so indicate by executing the enclosed copy hereof in the space provided below and returning such executed copy to us.

Very truly yours,

HUGHES TOOL COMPANY

by _____

Vice President

ACCEPTED THIS DAY OF JULY, 1959:

NORTHEAST AIRLINES, INC.

President

EXHIBIT A 7

STRAIGHT TELEGRAM

FEBRUARY 18, 1960
(BY PHONE TO WU)

DAVID A. STRETCH
1050 FIFTH AVENUE
NEW YORK, N. Y.

THE FOLLOWING IS STATUS RESPECTING CONVAIR JET EQUIPMENT FOR NORTHEAST AIRLINES MOST OF WHICH IS ALREADY WELL KNOWN TO YOU. FIRST WE HAVE COMPLETED NEGOTIATIONS WITH CONVAIR FOR SIX PLANES WITH DELIVERY STARTING NEXT FEBRUARY OR MARCH AND CONTRACTS NOW BEING DRAWN. SECOND I AM IN DIRECT NEGOTIATION WITH HOWARD HUGHES TO SUBSTITUTE FROM FOUR TO SIX OF HIS EARLY DELIVERY CONVAIR JETS FOR EQUAL NUMBER OF OUR LATER DELIVERIES AND SUCH NEGOTIATIONS ARE WELL ADVANCED. THIRD WE ARE IN EARLY STAGE OF NEGOTIATION WITH DELTA TO SUBSTITUTE SOME OF THEIR EARLY DELIVERIES IF HUGHES DOES NOT DO SO. FOURTH WE HAVE CONVAIRS COMMITMENT THAT THEY WILL SUBSTITUTE THE PLANES FOR EARLIER DELIVERY TO CAPITAL AIRLINES IF FOR ANY REASON CAPITAL DOES NOT GO THROUGH WITH THEIR PURCHASE. FIFTH WE ARE THEREFORE IN DIRECT NEGOTIATIONS WITH ALL PARTIES CONCERNED WHO HAVE ANY CONVAIR JETS FOR DELIVERY EARLIER THAN THE ONES WE ARE GETTING AND NEED NO HELP IN THESE RESPECTS AND FURTHER I BELIEVE YOU HAVE BEEN IN DIRECT CONTACT WITH THE CAPITAL AIRLINES PERSONNEL ABOUT THESE SAME MATTERS.

FLOYD B. ODLUM.

CHARGE ATLAS CORPORATION

EXHIBIT A 8

DRAFT

15 February 1960

Northeast Airlines, Inc.
Logan International Airport
Boston 28, Massachusetts

Gentlemen:

Reference is made to the Letter Agreement dated 22 January 1960 between Northeast Airlines, Inc. (hereinafter called "Northeast") and General Dynamics Corporation (hereinafter called "GD") covering the lease by GD of six (6) Convair 880 aircraft to Northeast and to letter to Northeast dated 22 January 1960 and signed on behalf of GD by Mr. J. V. Naish, President - Convair Division, relating to certain adjustment of the aircraft delivery dates if Hughes Tool Company, prior to 15 February 1960, agreed to defer the delivery of any of the Convair 880 aircraft to be delivered under its contract with GD.

Said Letter Agreement provides, among other things, that in the event the conditions set forth in paragraph 2. thereof have not been accomplished on or before 15 February 1960 and a mutually satisfactory Lease Agreement between the parties has not been completed, executed and received by GD prior to 15 February 1960, then said Letter Agreement is void and of no further force and effect. Northeast has requested that GD extend the date by which said Lease Agreement is to be so executed and GD for and in behalf of the considerations hereinafter set forth is agreeable to so extend said date as follows.

GD hereby agrees (1) to amend said Letter Agreement by deleting the words and figures "15 February 1960" wherever the same appears in paragraph 3. of said Letter Agreement and to insert in place thereof the words and figures "15 March 1960" and (2) to extend from February

Exhibit A 8

15, 1960 to March 15, 1960 the date appearing in said separate letter pertaining to adjustment of delivery dates.

In consideration of the extension set forth above, Northeast agrees that if the conditions set forth in paragraph 2 of said Letter Agreement have not been satisfied and the Lease Agreement referred to in paragraph 3. of said Letter Agreement has not been completed, executed and received by GD prior to 15 March 1960, or such later date as may be agreed to in writing between Northeast and GD it will pay to GD fifty percent (50%) of GD's actual costs paid or incurred with respect to said six (6) Convair 880 aircraft during the period of 15 February 1960 to 15 March 1960, provided, however, that the total amount payable by Northeast to GD hereunder shall not exceed \$50,000.

Except as amended hereby, all other terms and conditions of the Letter Agreement and separate letter referred to in the first paragraph hereof shall remain in full force and effect.

If the understandings and arrangements herein set out are acceptable to Northeast, please so indicate by executing two (2) copies of this letter in the space below provided for your signature and by delivering to GD said copies, thus constituting this an agreement between us.

Yours very truly,

GENERAL DYNAMICS CORPORATION

s/ J. V. NAISH

President—Convair Division

Accepted and agreed to
as of the 15th day of February 1960

NORTHEAST AIRLINES, INC.

By _____

Title _____

EXHIBIT A 9

4:50 PM

3-19-60

HRH pp. 3

Trying to get figures compiled. Can he talk now. 1st of all wants to talk to me as a friend in a difficult time. i.e., divorced from the Bank. May think he is vacillating. You know how I work but won't divorce myself from Bank. I will respect confidence but this big secret may be not repeatable to others. Can he explain on a hypothetical basis? Ans. Yes. He wants to be conscientious. Will ask us to take his word. He will do exactly what he promised—this is thinking out loud.

The big piece of information—very secret—no whisper—H. is confident that he can about say that it is almost agreed that he concluded a merger with N.E. Airlines. Has made a deal OK to Odlum & Stretch (new head of N.E.). This takes CAB approval but Odlum waited until CAB stat. on mergers which fits this merger. Talks with CAB have given Odlum off the record OK of a merger with Amer. or TWA. (United has never sought this but Amer. has.) H. feels there is a substantially better than 50-50% of OK by CAB. H. believes merger will be Ok'd & they will get So. transcontinental route approval. This will be "Tops" in route system.

This would be a common stock exchange deal. N.E. was trying to lease 6—600's for Miami route—so much economy from merger (Ticket offices—terminal facilities—advertising, etc.) This deal is 80% done. In any event will take over on an operating basis almost at once.

Next—a separate deal but simultaneously—now going on—another deal—This is simpler but not as sure. i.e., a 40% chance of completing. For practical purposes so far he is in accord with Odlum to leave Atlas on 22

B. of A. CARVER

EXHIBIT A 10

on vacation

10-13-60

pp 1

10-13-60

at 2:30 I called R L G because H R H called me (a) 11:45 AM Bob said he talked to H R H this AM—Told him of decision—Met. agreed to go only if D. R. plan thru as drawn—Really TWA could refund with points but Tool Co could not apparently Equit. told Met. this is too tough—so now Tool Co can purchase notes after 1st year (a) 124% of par reducing $\frac{1}{4}\%$ per $\frac{1}{4}$. Now a wire from Equit that stand by extended to Monday.

Bob told HRH we were sympathetic but there appeared to be nothing we can do. What he wants is a few days, then he can dispose of 880's ($\frac{1}{2}$ of them anyway) Wants to pay Equit & Banks & get some time to finance the plane purchases. Bob mentioned Tool Co debt to us and to Irving Trust & this must be taken care of

RLG said if Equit stands by for a week & Irv stand by for 60 days we can take another look—but no hopes expressed.

RLG then went over it against with NB & Shanley & concluded couldn't put together another unsound plan on piece work basis.

end talk 3:10

Needed		220 M
Restricted by TWA	8.5	
Cancel 13—880 & get Credit	58	66.5
Se need to finance		153 5
Crown	30	
Convair	10	40
B of A 45 } Chase 35 } 1st 35 }		= 115 M
		113.7

22 M's not covered—Nor
are 600's—get out 6 to NE

EXHIBIT A 11

Hughes

11/14/60

1:30 pm

11-14-60

N/E matter completely resolved

Re: getting Naish's consent to cancel 7 planes, prefers to let it wait until mid afternoon until after the N/E matter resolved in every detail in Convair legal Dept.

Forrester came on the line

Will give 7 indep directors out of 18—to preserve the subsidiary concept

Quoted Equitable as having told Cook that they'll go on any one 3 basis:

1. Full voting trust if they put new money in.
2. 5 yr. schedule w/o voting trust or change in mgmt provided it is part of a type of 9/26 program
3. (1) Immediate payment of somewhere between \$8 & 16 mm and continue for 6 mos to 1 yr on the balance.

Our present plan better than either 2 or 3

Forrester wants Eq. to go longer than 5 yrs. Hughes discouraged this, inasmuch as it might upset the apple cart

Let Crown break the trail—Forrester & Hughes concur

Hughes suggest he will put the 7 independent members in, but don't tell it to Crown or Eq. Use it only as a counter offer.

He will Naish's answer on 7-880 cancellation to Keath tonight

B. of A. GORDON

EXHIBIT A 12

9-9-60

TWA FINANCING PLAN

Memorandum of understanding relative to TWA financing reached among the so-called TWA Bank group on Friday, September 9, 1960, all of the banks being represented except Security-First National Bank, Los Angeles; California Bank, Los Angeles; and National Bank of Commerce, Houston, whose approval and agreement were obtained by telephone either concurrently with or subsequent to the meeting of the banks.

The following funds are to be provided:

Balance of cost of 19—CV 880's	\$ 64,753,000
Balance of cost of 6—CV 600's	24,947,000
Interim bank loans	27,000,000
Equitable loan to be continue as is	—
	<hr/>
	\$116,700,000

Under this proposed plan, Equitable Life Assurance Society would continue its present matured loan without immediate reduction but on monthly amortization over a five-year period beginning immediately. Equitable would release to the extent of \$15,000,000 its present hold on rentals on aircraft owing by TWA to the Hughes Tool Company. Equitable's loan would continue to be guaranteed by the Hughes Tool Company and such guarantee would be supported by collateral mentioned hereafter *pari passu* with the other lenders, including the Convair Division of General Dynamics Corporation. Interest rate 6%.

Exhibit A 13

Funds to accommodate the above financing would be supplied by the following banks and by Convair:

Irving Trust Company	\$13,500,000
Bank of America	13,500,000
Bankers Trust Company	13,500,000
Mellon National Bank & Trust Co.	13,500,000
Security-First National Bank	8,000,000
First National Bank of Boston	5,000,000
California Bank	2,400,000
National Bank of Commerce	700,000
Convair	35,000,000

The following assumptions and/or conditions underly the plan, which admittedly is barely adequate to accomplish what needs to be done and then on only a stopgap basis, it being understood that TWA and Hughes Tool Company will as soon as possible arrange permanent financing:

1. There are 4—CV 880's on order by Hughes Tool Company and 7—CV 22M's from the Capital Airlines deal similarly on order, the financing of none of which is contemplated in this plan, tacitly or otherwise or in any other financing plan. On the contrary, it is understood that the Hughes Tool Company will dispose of these planes so as to relieve themselves of liability therefor well within any time limitations prescribed by the purchase agreements. It is understood also that arrangements have been made on a

B. of A.—GORDON

Exhibit A 12

contingent basis, by Howard R. Hughes or Hughes Tool Company, but not by TWA, for the purchase of an additional 7—CV 600's for which no financing has been approved and no indication of intention to finance has been given. Howard R. Hughes or Hughes Tool Company is to agree to make proper disposition of those planes also within the limitation of the terms prescribed for their purchase.

2. It is intended that the existing airplane loans of Hughes Tool Company will continue in a reduced amount as set forth below. The entire financing is to have the approval of the CAB to the extent that such approval can be obtained. Because it is intended that this financing is stopgap financing only and that as soon as practicable and possible full refinancing of the fleet would be brought about on a long term basis, all of the lenders, including Equitable would agree to permit prepayment of their loans in full without penalty, irrespective of the rate of interest at which such refunding may be made.
3. The Convair Division of General Dynamics Corporation would carry up to \$35 million of the financing on a basis *pari passu* with the lenders as to the collateral but with payment deferred until the banks shall have been paid.
4. TWA is to pay to the Tool Company \$15 million on accrued airplane rentals and the Hughes Tool Company is to use the said \$15 million to reduce its airplane loans made by Irving Trust Company and Bank of America, \$3 million and \$12 million respectively.

Exhibit A 12

5. The bank loans would be written at 6% interest with equal monthly amortization (or the equivalent modified to be compatible with season income patterns) sufficient to liquidate the indebtedness over a five-year period. There would be a provision for a contingent earnings sinking fund equivalent to 75% of net earnings of TWA, after taxes, to be applied on latest maturities. There would be a commitment commission on the unused portion of the bank commitment equivalent to $\frac{1}{2}$ of 1% per annum, payable quarterly.
6. The management clause and provision for voting trust called for in the Dillon Read plan would continue as part of the new financing.
7. All aircraft are to be held in the name of TWA. Aircraft now held by Hughes Tool Company and leased to TWA would be sold to TWA on a conditional sales contract. The collateral held by Tool Company banks would be assignment of such conditional sales contract in lieu of chattel mortgages and payments on said conditional sales contract would be only such amounts as would be necessary to meet the payments on the bank loans secured thereby until such time as the bank loans would be repaid.

Page two of four

B. of A.—GORDON

Exhibit A 12

8. Hughes Tool Company would subordinate to lenders its entire present investment in the airplane program except for the amount of \$15,000,000 permitted to be paid by TWA to the Tool Company for repayment to Irving Trust Company and Bank of America.
9. There are to be no aircraft purchases or leases or commitments relating to purchase or lease, et cetera, by or for TWA or Hughes Tool Company or any other company or individual which would involve TWA or Hughes Tool Company, either directly or indirectly, without the written consent of the lenders, including Equitable Life Assurance Society, holding at least 66 $\frac{2}{3}$ % of outstanding obligations under this plan.
10. There would be no merger or plans to merge, no consolidation or plans to consolidate, or other similar or dissimilar deals involving TWA or Hughes Tool Company, without the written consent of the lenders, including Equitable Life Assurance Society, holding at least 66 $\frac{2}{3}$ % of outstanding obligations under this plan.
11. There would be no borrowings by TWA or Hughes Tool Company without the written consent of the lenders, including Equitable Life Assurance Society, holding at least 66 $\frac{2}{3}$ % of outstanding obligations under this plan.
12. Loan agreements in connection with the new financing would follow for control purposes the loan agreements prepared under the Dillon Read plan.

Exhibit A 12

These would include, but not be limited to, working capital limitations and guaranties thereof by Hughes Tool Company.

13. No action will be taken by the lenders in connection with anything requiring the approval of Mr. Hughes unless approval thereof by Mr. Hughes shall have been first received by the lenders in writing.
14. Howard Hughes Medical Institute would furnish its financial statements regularly to Bank of America to be held in confidence by them and Bank of America would indicate to the lending banks whether in its opinion the \$18,000,000 note held as collateral is regarded by them as being good collateral.

Subject to the foregoing assumptions and/or conditions, the essence of this financing plan is as follows:

Hughes Tool Company debt to Irving Trust Company would be reduced \$3 million and its debt to Bank of America would be reduced \$12 million to the following figures:

Hughes Tool Company then owing to Irving Trust Company	\$14,286,666
Hughes Tool Company then owing to Bank of America	34,782,011
	<hr/> \$49,068,677

B. of A.—GORDON

Exhibit A 12

This indebtedness would be collateralized by the following:

First liens on: 11-Boeing 707—131's
 4-Boeing 707—331's

H.H.M.I. note approximately \$18 million

Approximately 5¼ million shares TWA stock owned by Hughes Tool Company
Hughes Tool Company real estate comprising approximately 1,300 acres in Culver City, California; approximately 25,000 acres in Las Vegas, Nevada; approximately 16,000 acres in Tucson, Arizona; and approximately 88 acres in Houston, Texas.

New TWA bank loans aggregating \$83,600,000 and Convair loans for \$35,000,000 to be collateralized as follows:

First liens on: 6—CV 600's
 20—CV 880's
 7—Boeing 707—331's

The above bank loans of \$83,600,000, Convair loan of \$35,000,000 and the Equitable loan of \$27,000,000 are to be guaranteed by the Hughes Tool Company. To support its guarantee Hughes Tool Company will provide a second lien on all of the collateral listed above which is held to secure bank loans to the Tool Company aggregating \$49,068,677.

B. of A.—GORDON

EXHIBIT A 13

Discuss with Hughes. 9-18-60 7:05 pm I called

Q. How many of the 4 extra CV 880's does TWA need and you will approve their buying provided they can be financed?— A. Two only— Get rid of them later if possible. Hold out 2-880's for Tool Co. to dispose of as they see fit. A good trading position for Hughes. Convair wants 2 of them for N/W as an inducement for N/W to buy 600's

Q. Will you pass this word along to them as they can figure accordingly? A. If any of the 4 get to TWA & are withdrawn for Convair—might be subject to some smart lawyers attack. Prefer to hold all four out. If necessary to complete financing will give up 2-880's.

Q. If necessary to firm up the financing will you immediately release them. A. Yes.

Q. I understand from Keath that TWA doesn't want the 22m's and you don't want TWA to have them. Is my understanding correct? A. Hughes thinks it would be a mistake to commit TWA to take them. Would prefer to hold them out. TWA may want them later if the 880 advertising program gets hot.

Q. How do you propose to relieve the Tool Company of the obligation of \$25,750,000 in connection with the 22m's & how soon can this be done? A. 1. Wants to start negotiation with Convair for another 17-600's to total 30 in all. these to be financed by Convair. Can't be resolved until the 880 gets into service & catches on with the public. The 17-600's would presume disposal of 15-131's. Convair to finance the 4-880 & the 7-22m's in addition to the new 17-600's Collect \$50 million from charity on R/E purchase & pay-off of 18 million note—on borrowing basis.

B. of A.—GORDON

EXHIBIT A 14

Hughes 10/24/60 9:45 am

10-24-60
he called

asked how many sails we'd have to cut adrift

Told him about Houston bank report—Cook out trying to get loan on oil properties

Says NY (?) trying to get him into court this afternoon—Cook says an effort to get Hughes Tool Co & TWA into receivership this afternoon—Cook now talking to Keehn to call him off

Hughes had Crown's atty talk to Crown to ask him to go to his bank this afternoon. Said he wouldn't like it but would do so.

Drury to come in to see us to firm up conditions precedent
Forrester is supposed to be here or on the way here representing Merrill Lynch.

Has talked with Jack Naish.

Naish has had an inquiry from the Air force for 7—880's and an inquiry from a company which would lease another 7 to Nat'l Airlines

Wants our permission to let Hughes Tool Co. commit firm for 6—600's so the first 6—880's for N/E can be firmed up by Convair—The 600's would be deliverable in next July & August. He can't see how the possibility of a receiver would affect anything Tool Co. might do in the purchase of 600's for alternate use by TWA. I told him this would have a vital affect.

How would the 600 deal affect his net position? HRH says only in this way a) at present committed for 6—880's & increased about \$4—5,000,000 in cancellation of 6—600's. If N/E could finance the 6—880's then Hughes Tool Co. would be better off than if they could not cancel the 600 order Would be worse off to the extent of cancellation costs.

B. of A.—GORDON

EXHIBIT A 15

10-27-60 Called HRH 9 PM

he called back & will call me in AM

10-28-60 He called 8:30

TWA BD meets this AM.—Told Cook what is in air—So Cook have Board authorize Leslie to seek financing based on a group of Bks headed by B of A.—Told him all eggs in 1 Basket—no blunders—don't do anything w/o of A OK.

HRH told Cook (11 of 18 directors there) to make resolution at once that since meeting called to consider financing but deal blew up now only routine purposes but something must be done. Cook said call for full Board as soon as can get there—Ben objected—wanted to know when—adjourned to 4:30 Mon P.M. (Ben wanted TWA resolution to favor DR plan & put onus on Tool Co. for rejection)

Sent work to M.L. at once as Forrester & Linniss not out here yet.

Nat'l Bk of Comm. give legal-limit & small banks feel it is resolved & could put group together but can't do it now. Total debt about 12,000,000—can get 4½ sq need 7½ for his personal. Can get latter out of Oil—partners name Thayer—Sessel—Leslie & Wright voted against Rays motion & Maestre abstained.

Leslie wants to be Pres (Talked to Cook this AM)

Has OK'd sale of 7 planes to Nat'l & 7 to Govt.

9:10—RLG got on phone—went over suggested program thoroughly HRH—demurred on going East (1) health—maybe OK (2) Convinced Sessel & group determined to get control of TWA & doesn't want to tell his details to "enemy"

B. of A.—CARVER

A-171

EXHIBIT A 16

but Howard has proposed that down payments on 880's be applied to first airplanes taken.

He doesn't know whether any progress being made on 14-880's.

Nat'l. Airlines deal seems to be moving faster than the air force deal.

He will let us know of any developments. If Crown won't go for M. L. Hughes will ask for his suggestions & let us know—we may then make suggestions.

Hyland 11/7/60 He called 9:55 am

Gave such assurances as we could to encourage his support.

B. of A.—GORDON

EXHIBIT A 17

11-11-60

11-11-60

pp 2

HRH says Bautzer will agree that Crown knew before he ever came West that money would not go to G. D.

Crown talked on basis that 880's

NE deal—1 point unresolved. Crown to arbitrate it. Naish has HRH's complete authority to sell 14 planes—(in spite of what Naish told Gully & the Col:)

What do you want on 880's? Up to G.D.? Prefer to see them go to TWA but can't finance them.

If GD sees D.R. plan won't go thru & bankruptcy alternative, then must find a way to help TWA. HRH is sure that G.D. must help—did help Capital—N.E. etc.

HRH is to call me

If Crown welches in this deal, this will be the 5th one and none of them HRH's fault.

Says (1) Told Crown in Chicago

(2) Crown knew & talked about paying off Equity & getting their collateral—

(3) Re-applying deposit on some planes & easier to finance balance

So he knew 1st 880's go to NE & hoping to unlock 6-880's for TWA if deposit were applied. So knew no money for G. D.

HRH Gets confidential (Convair wants me to take Dillon Reed deal to get cash for planes—but pretend not to keep in HRH's good graces.

If Crown deal goes then G.D. won't sue him for contract performance.) So they mustn't know that B of A became agent bank & accept terms on basis of last occasion but during period of closure reserve right to get around vote trust

B. of A. CARVER

EXHIBIT A 18

10-19-60

6 P.M.

HRH. called.

Amplifier attached to wire outlet with hand phones for me.

He will go into Receivership first

after I said we wouldn't
give him 30 MM loan

Thinks he can get Gov't help—

Pay the Banks the TWA loan

Tender Equit. a proposal for repay't of their loan.

HRH will contend Equit has no real right to immediate
payt. (no consideration for change in agreement—Will
give 1st pay't along with it.)

Will offer a shorter pay off—as collateral. If they then
throw TWA in receivership it is up to them.

Will offer all 880 for sales at once.

Glass or Austin as Pres. at once.

Go along on Boeing until 600 come along—making best
of what we have has always been OK in the long run
(1649 as example) 15-120 can go to fan engines if needed.
Sell 880 & get some money back. Henry Crown has said
again he wants to go into deals with HRH—Wants us to
look at collateral for his loan. * * * Will (1) send some
one in to see RLG in the A.M.

(2) who should be President?

We will accept either as previously stated—as I

Glass

remember it Austin might be the better of the 2 as
of now because he has been a Pres.—Potentially
Glass maybe be the better but we have no strong
ideas on subject.

B. of A.—CARVER

EXHIBIT A 19

11-1-60

He related his long conversation with Crown. Said he made it clear that maybe the D-R plan would be best for G D but he was quite sure he'd let the Co. go into receivership rather than the D-R plan. Told Crown he'd buy all his future planes (near future, I think he meant) from Convair. Also, that if a receivership were the result, a receiver would have to buy competitively.

Gave Crown an out but Crown said he wanted to go ahead and would call Pace & correct some statements. Told him of Counsel's opinion re: the loan of \$12,000,000 from HHMI to HT Co. Loan should run to the end of the present lease or maybe a year before—3 to 4 years at 6%—or could be shorter term, whatever terms bank decides.

Property will be that now under lease from Ht Co. to

Drury should know this.

Cook to ask Drury to tell us. Asked if it looked like we could put the deal together. I said it looked like it was getting closer.

H. told me that Crown has a letter from 1st N/B of Chi regarding his N/W rather than a statement. Hughes expects us to take the Equitable note (which Crown will buy) as additional collateral.

He will give us a letter re: the Tool Co. TWA debentures & will make a deal with M-L the same as the HHMI deal & Forrester will give us the necessary assurances. Hughes still a little nervous vis a vis G.D. Warned that they might try to upset the Crown deal. He plans to "level with Naish".

B. of A. GORDON

EXHIBIT A 20

Keath 3:30

Hughes does not want the D-R deal now. Cook to call within half hour and read letter he and Cook have been preparing for Equitable.

Next Tuesday Bd. will meet. Sessel's resignation will be requested—Glass may be put in as president. Exec. offices to be moved to L.A. etc. (may be only for publicity) (Keath will be at Frontier 9-1487.)

No problem on R/E deal between Tool Co. and HAC.

Says we can have complete reliance on him in future dealings with him.

Naish is working on plane deal to get rid of 880's & 22M's.

Trying also to firm up the N/E deal but will have to firm up the 6-600 deal.

Have learned his lessons will not ask us to finance Con-vairs for him. Will keep 880's only if someone comes along with financing of them.

Asking us to

Do \$30 MM Crown deal to pay off Eq or \$40 MM HHMI Crown deal. Is meeting to work on Irving deal. Be at office at 10 a.m. tomorrow.

3:55 p.m.

EXHIBIT A 21

BEFORE THE
CIVIL AERONAUTICS BOARD

Docket No. 1182

In the Matter of the Application of

HUGHES TOOL COMPANY

for approval under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the acquisition of control of

TRANS WORLD AIRLINES, INC.

MOTION OF TRANS WORLD AIRLINES, INC.

FOR APPROVAL OF TRANSACTIONS WITH

HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC. (hereinafter referred to as "TWA") respectfully moves that the Board enter an order herein modifying its Order Serial No. 3210, issued October 17, 1944, as amended, approving the acquisition of control of TWA by Hughes Tool Company (hereinafter referred to as "Hughes"), so that the terms of such order will not restrict the right of TWA to purchase from Hughes Tool Company up to 25 jet powered aircraft suitable for operation by TWA on both its domestic and international routes.

1. Thorough studies have been made by TWA of the characteristics of all jet aircraft available in this country and abroad. None of these aircraft has the range desirable for all-year around operations across the Atlantic so as to permit non-stop services in both directions under the extreme conditions frequently encountered on that route.

2. During the past few years important new developments have occurred affecting jet aircraft which make it possible to design aircraft at this time that are superior

Exhibit A 20

in performance, safety and economy to the commercial aircraft now being constructed, the designs for which were initially laid down four or five years ago.

3. Hughes Tool Company has indicated to TWA that, subject to approval of the Board, it is willing to construct jet transport aircraft for TWA's use, taking into account the most recent design developments, on terms that are at least as favorable in every respect as those that can be secured from any manufacturer for a similar aircraft. Deliveries of such aircraft will commence in 1961. The aircraft will be used interchangeably on TWA's international and domestic routes.

4. Hughes Tool Company has advised TWA that it is willing to sell such aircraft to any other airline at the same price as sold to TWA.

5. Hughes Tool Company has also advised TWA that the aircraft would be constructed by the Aircraft Division of Hughes Tool Company in a new factory to be located in accordance with the recently announced policy of the Air Force to insure the widest possible dispersal of aircraft production facilities.

WHEREFORE, Trans World Airlines, Inc. respectfully prays that the Board enter an order herein modifying the Board's Order Serial No. 3210, as amended, so that the terms of such order will not restrict the right of TWA to acquire from Hughes Tool Company the aircraft as referred to above, and providing such other and further relief as may be appropriate.

Respectfully submitted,

TRANS WORLD AIRLINES, INC.

By Warren Lee Pierson

Chairman of the Board

May 10, 1956

EXHIBIT A 22

UNITED AIRCRAFT CORPORATION

EAST HARTFORD 8, CONNECTICUT

OFFICE OF THE
PRESIDENT

April 5, 1957

Mr. Howard B. Hughes, President
Hughes Tool Company—Aircraft Division
Florence Avenue at Teale Street
Culver City, California

Dear Howard:

Following your telephone call to me this week we have discussed among ourselves your request for Pratt & Whitney Aircraft's assistance and cooperation in selling the excess J57 and J75 engines which you have on order.

It has, of course, been our practice when a customer has in his possession more Pratt & Whitney Aircraft engines than he requires, to do all possible in assisting such a customer in their sale. However, in your case, you do not now possess more engines than you need, but rather you have on order some 200 more engines than you require for TWA. There is no necessity of your taking delivery of these engines, because we have offered you the privilege of a no-charge cancellation if requested immediately, and have also told both TWA and your representatives that we would agree at this time to an assignment of these 200 engines to Boeing.

As you will no doubt recall, your orders for a total of 300 engines were placed by your representatives just prior to our price deadline on February 15, 1956. We remonstrated with your representatives because of the large quantity of engines desired to be purchased, and pointed out that TWA could not possibly need such a great quantity of engines, and that our analysis of Boeing's orders

Exhibit A 22

indicated to us that Boeing had already ordered installation engines covering TWA. However, there was no time prior to the deadline to check TWA's actual requirements, and in the interest of permitting acceptance of your orders prior to the deadline, we accepted them with the understanding with your representatives that any duplicating orders would be cancelled following a reconciliation of actual requirements.

Now you apparently are contemplating going through with this rather large order and marketing these engines in competition to Pratt & Whitney Aircraft. You further ask our cooperation and assistance in disposing of these engines. As I told you during our phone conversation, complying with your request would place us in a pretty untenable position. If we were to assist you in disposing of your speculative order of some 200 engines, we would certainly be encouraging others of our good customers to similarly speculate, which would place us in a completely impossible position.

I hope that you can be sympathetic to our point of view and understand that we must refuse your request. I hope that on further consideration of this matter you can accept at this time either our offer to cancel on a no-charge basis, or our offer to accept an assignment of these excess engines to Boeing.

Again I should like to urge you on your next trip East to pay us a visit in Hartford and see both our development and production facilities. We have some very excellent tools for the work at hand and think we are doing a good job on both the J57 and the J75. I am sure that with your extensive aviation background you would find such a visit interesting.

Sincerely yours,

BILL

W. P. GWINN

President

A-180

EXHIBIT A 23

LB017

WESTERN UNION

TELEGRAM

L LLU062 HL PD AR=TDL PWS SEATTLE WASH APR 15
HOWARD HUGHES=

7000 ROMAINE ST HOLLYWOOD CALIF=
WITH REGARD TO AN ASSIGNMENT BY HUGHES
TOOL TO BOEING OF ITS CONTRACT TO PURCHASE
JET ENGINES WE ARE SETTING FORTH HEREIN-
AFTER OUR PROPOSAL WITH RESPECT TO SUCH
ASSIGNMENT.

¶ 1. HUGHES TOOLS COMPANY REPRESENTS THAT
IT HAS A FIRM CONTRACT WITH PRATT AND WHIT-
NEY FOR THE PURCHASE AND SALES OF MODEL
JT3C-4 AND MODEL JT4A-3 PRATT AND WHITNEY AIR-
CRAFT ENGINES TOTALLING TWO HUNDRED SUCH

=END 1=

(copy sent Air Express to Raymond Cook in New York
4/16/57

copy sent to Cook's Houston office—airmail—4/16/57
copy to Bill Gay

read to R. W. Rummel by telephone—4/16/57
original to Operations—4/16/57)

A-181

Exhibit A 23

WESTERN UNION

TELEGRAM

L L LLU062 LONG SHEET 2=

ENGINES IN THE AGGREGATE, THAT BY THE TERMS OF SAID CONTRACT THE PRICES FOR SUCH ENGINES ARE \$145,000 FOR EACH MODEL JT3C-4 ENGINE AND \$210,000 FOR EACH MODEL JT4A-3 ENGINE, THAT HUGHES TOOL COMPANY HAS THE RIGHT TO ASSIGN ITS INTEREST IN SAID CONTRACT.

1 2. HUGHES TOOL COMPANY AGREES TO ASSIGN TO BOEING ITS RIGHT UNDER SAID CONTRACT TO PURCHASE ALL 200 OF SAID ENGINES SUBJECT TO THE FOLLOWING CONDITIONS =

1 /A/ BOEING WILL ACQUIRE JT-3C-4 ENGINES SUBJECT TO PARAGRAPH 2 /F/ BELOW AND WILL PAY TO HUGHES TOOL COMPANY THE AMOUNT OF \$10,000=

END 2 =

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Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 3=

FOR EACH OF FIFTY JT3C-4 ENGINES. THIS AMOUNT
TOTALING \$500,000 WILL BE PAID ON THE SAME PAY-
MENT SCHEDULE THAT WOULD BE IN FORCE HAD
HUGHES TOOL COMPANY ORDERED THE ENGINES AT
THE DATE HEREOF AND TO THE DELIVERY SCHED-
ULE OF THE HUGHES TOOL COMPANY AGREEMENT
WITH PRATT AND WHITNEY. IT IS UNDERSTOOD
AND AGREED THAT THE \$10,000 PER ENGINE WHICH
BOEING AGREES TO PAY TO HUGHES REPRESENTS
THE DIFFERENCE BETWEEN THE CONTRACT PRICE
AND THE PRESENT SELLING PRICE OF SUCH JT3C-4
ENGINES AND HUGHES TOOL COMPANY AGREES

THAT IN=

END 3=

A-183

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 4=

THE EVENT THAT THE SELLING PRICE OF ANY ENGINES WHICH WOULD HAVE BEEN PURCHASED AS OF THE DATE OF ACCEPTANCE OF THIS AGREEMENT FROM PRATT AND WHITNEY IS REDUCED PRIOR TO THE DATE THE FINAL PAYMENT IS DUE UNDER THE HUGHES TOOL COMPANY AGREEMENT THE PAYMENT BY BOEING TO HUGHES TOOL COMPANY WILL BE REDUCED IN A LIKE AMOUNT.

1 /B/ BOEING WILL, IMMEDIATELY UPON ACCEPTANCE BY HUGHES OF THIS OFFER, PAY TO HUGHES A SUM EQUAL TO THE AMOUNT OF PAYMENTS HERETOFORE MADE TO PRATT & WHITNEY BY HUGHES ON=

END 4=

A-184

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 5=

ACCOUNT OF THE PURCHASE OF SAID ENGINES PURSUANT TO THE TERMS OF THE CONTRACT BETWEEN HUGHES AND PRATT & WHITNEY.

¶ /C/ BOEING WILL AGREE TO MAKE ALL FUTURE PAYMENTS TO PRATT & WHITNEY REQUIRED BY THE TERMS OF THE CONTRACT BETWEEN HUGHES TOOL COMPANY AND PRATT & WHITNEY AND TO SAVE HUGHES TOOL COMPANY HARMLESS FROM ANY LIABILITY WITH RESPECT THERETO.

¶ /D/ THE ASSIGNMENT TO BOEING OF HUGHES TOOL COMPANY'S INTEREST IN THE CONTRACT BETWEEN HUGHES TOOL COMPANY AND PRATT & WHITNEY WILL PROVIDE THAT BOEING WILL HERE-AFTER BE CONSIDERED=

END 5=

A-185

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 6=

TO BE THE PURCHASER UNDER SAID CONTRACT AND THAT HUGHES TOOL COMPANY WILL HAVE NO FURTHER INTEREST THEREIN, AND THAT PRATT AND WHITNEY WILL AGREE THAT NO LESS FAVORABLE TERMS AND CONDITIONS WILL APPLY TO THESE ENGINES THAN WOULD APPLY UNDER BOEING'S EXISTING CONTRACT WITH PRATT & WHITNEY.

1 /E/ THAT PRATT & WHITNEY APPROVE THE ASSIGNMENT CONTEMPLATED HEREBY.

1 /F/ THAT PRATT & WHITNEY WILL APPROVE REALLOCATION OF THE ENGINES BETWEEN JT3C-4 AND JT4A-3 IN ACCORDANCE WITH THE EXCHANGE OF TELEGRAMS IN AUGUST 1956 BETWEEN

END 6=

A-186

Exhibit A 23

WESTERN UNION

TELEGRAM

L LLU062 LONG SHEET 7—

BOEING AND PRATT & WHITNEY RELATING TO THE
ASSIGNMENT OF THE HUGHES TOOL COMPANY
AGREEMENT.

¶ THIS OFFER WILL REMAIN OPEN FOR ACCEPT-
ANCE BY HUGHES TOOL COMPANY UNTIL APRIL 17,
1957. FAILURE TO ACT ON THIS PROPOSAL PRIOR TO
MIDNIGHT, APRIL 17, WILL REQUIRE OUR OBTAIN-
ING ENGINES ELSEWHERE. PLEASE INDICATE YOUR
POSITION BY WIRE.

WILLIAM M ALLEN PRESIDENT BOEING AIRPLANE
CO—

A-187

EXHIBIT A 24

CREDIT MEMORANDUM

10-26-56

Los Angeles Headquarters
October 26, 1956

HOWARD HUGHES

Ben Sessel called yesterday, stating that he had attended the TWA Board meeting in Los Angeles on Wednesday. Apparently at that time Lloyd Wright introduced a motion instructing Noah Dietrich to be prepared to recommend the name of a new president for TWA at the next Board meeting. Failing that, Lloyd said he would introduce his own candidate. This was conveyed to Noah Dietrich, who was home ill, who then talked with Howard Hughes. Hughes apparently stated he felt the Board was pressing him, but that if they felt such action was proper, they should so vote. As a result the action was passed.

Ben then referred to a letter addressed to the banks, requesting authority to purchase three more Boeing 707's. Bob Gordon and I had discussed this preliminarily early in the week, and were prepared to give approval provided the documentation was satisfactory. Surprisingly, Ben had prepared a letter, which, in effect, stated that the banks were concerned about the expansion of purchases without financing, that the projection was out of date but that a substantial cash deficit was anticipated in the near future; therefore, the banks would withhold their consents until permanent financing had been arranged.

When we inquired what steps he would suggest in the event Mr. Hughes went forward anyway, there was no satisfactory solution available. We then reviewed our general philosophy; namely, that Mr. Hughes is difficult to control and his actions are irritating, but that it seemed wise to go along on minor matters, and not come to a "showdown" unless the matter is of considerable con-

Exhibit A 24

sequence and we are sure of our ground. It was suggested, for example, that he probably would be taking on \$15,000,000 worth of new 707's under this program, but, on the other hand, might well be selling \$25,000,000 or \$30,000,000 worth of surplus jet engines. Ben then stated this is just about what he will do, and that he will sell the engines at a net profit of \$15,000 an engine. I also mentioned that these three new planes would give TWA a plane for training purposes several months before any of its competitors would have one, and that as a result of trading the engine commitments, TWA would be in a most satisfactory position as against its competition in obtaining the new jet planes.

In view of this, we suggested to Ben that the letter be rewritten to show that we do approve of the acquisition of the three new planes, but that we recommend Hughes Tool arrange their long term financing as soon as is practical; that they provide us with new projections that are realistic in relation to their revised purchase and operating schedules, and that they reduce their other commitments by at least the \$15,000,000 of new plane orders that are being placed.

Ben seemed to be in accord with this and agreed to call this morning. Bob Kerr called Bob Gordon about the matter and had redrafted a letter, which, however, was still quite critical and on the negative side. After discussions with Nolan Browning and Tom Deane, Bob drafted an entirely new proposed letter, which is being sent to the Irving Trust Company today. Presumably Bob Kerr will let Bob Gordon know on Monday or Tuesday if our suggested letter meets with Ben Sessel's concurrence.

s/ KEATH L. CARVER,
Vice President

EXHIBIT A 25

HUGHES TOOL COMPANY

AIRPLANE PROGRAM PAYMENTS FORECAST

• • •

NOTE:

Hughes Tool Company purchased 300 engines from Pratt & Whitney of which 140 were subsequently assigned to Boeing Airplane Company. Under the assignment Boeing agreed to pay Hughes $\frac{1}{2}$ of the difference between Hughes' contract cost and Pratt & Whitney's present sales price, but not to exceed \$5,000 for each of 100 small engines (JT3C-4) and \$7,500 for each of 40 large engines (JT4A-3), totaling \$800,000, of which \$40,000 has been received by Hughes. The figures in the above schedule do not include the \$800,000.

EXHIBIT A 26

"Since engines were generally in short supply, at least during the initial period, or it was thought they would be, because everybody, Douglas, Lockheed—excuse me—Douglas and Boeing, was clamoring for engines, and engine availability" (Tr. Rummel-962) (R-13,608)

EXHIBIT A 27

FOR IMMEDIATE RELEASE

2/7/56

News from . . .

TWA

TRANS WORLD AIRLINES

HUGHES BUYS BOEING

JETS FOR TWA

Los Angeles, February 7—Howard Hughes today announced the purchase of eight jet-stratoliner airplanes from Boeing Airplane Company by the Hughes Tool Company which in turn will make the airplane available to its subsidiary, Trans World Airlines.

"This is the first step in providing TWA with jet airplanes," Hughes said. He added that, all told, 30 jet aircraft would be ordered for TWA "during the next few months."

Boeing has contracted to deliver the eight airplanes, which cost approximately \$4½ million each, during April, May, June, July and August of 1959.

Discussions are being had with the Boeing Airplane Company concerning additional airplanes for deliveries following these, the announcement said.

The jet-stratoliner model 120 has a top speed in excess of 600 miles per hour and a maximum cruising speed of 575 miles per hour. This, Hughes said, will reduce the flying time from Los Angeles to New York to four hours and fifteen minutes.

The planes will be equipped with an advanced type of engine silencer which will increase passenger comfort and reduce the take-off noise level.

A-192

Exhibit A 27

Mr. Hughes said that the planes on order from Boeing would be equipped with four Pratt & Whitney jet engines.

The jet-stratoliner is 134½ feet in over-all length, has a wing span of 130 feet, 10 inches, and will carry a payload of 31,500 pounds.

GG:cr . . . 020756

—TWA—

A-193

EXHIBIT A 28

Sessel

10/8/58

11:12 a.m.

He called me.

Said he called Bill Gay last night and followed through as per yesterdays agreement. Gay said not to write letter or wire that he had better ask Hughes to get in touch with us immediately.

At TWA meeting both Cook and Holliday present. Neither had heard from Hughes—pointed out that Hughes Tool has not yet agreed to furnish jet planes to TWA.

Re: discussion of purchase of jet simulators by Tool Co. for use by TWA—Cook said Hughes Tool Co. had NO intention of selling or leasing their stuff (jet planes implied) to TWA—just as Sessel was explaining this (several TWA directors had immediately jumped on Cook) our telephone line appeared to open up (a click like a lifted receiver) whereupon we terminated the conversation at once. Sessel said matter could wait.

He closed by saying that nothing had happened since his call to Gay.

B of A GORDON

EXHIBIT A 29

HUGHES TOOL COMPANY

EXECUTIVE OFFICES

TWENTY-SECOND FLOOR GULF BUILDING

HOUSTON 2, TEXAS

November 1, 1957

Mr. Carter L. Burgess, President
Trans World Airlines, Inc.
380 Madison Avenue
New York, New York

Re: Purchase of Spares and Customer
Furnished Equipment for Jet Aircraft

Dear Mr. Burgess:

Hughes Tool Company has ordered a number of Boeing Model 707-131, Boeing Model 707-331 and Convair Model 880 jet aircraft. For various reasons Hughes Tool Company can not yet commit itself to TWA with respect to these aircraft, either as to type or number; but, on a basis to be determined later, it is expected that some jet aircraft will be made available to TWA. Hughes Tool Company proposes, therefore, that TWA handle the purchase of spares and customer-furnished equipment for these jet aircraft under substantially the same procedure which was followed last year for piston equipment. Specifically we propose that TWA act as a special agent for Hughes Tool Company for the purchase of (a) customer-furnished equipment which may be specified in the purchase contracts and (b) spare parts and equipment which in the judgment of TWA would be necessary for the operation of the jet airplanes by TWA.

Exhibit A 29

By letter dated November 21, 1956, Mr. John A. Collings, then Executive Vice President of TWA, notified the undersigned that TWA's estimated costs for CFE and spares under the several purchase contracts (less engines but including "ground support equipment") would be \$52,357,000.00. We suggest that the estimate be reviewed and (with reasonable itemization) either verified or revised on the basis of current information. Until we have approved the revised estimate, and in any event until further notice, TWA's authority to make purchases on behalf of Hughes Tool Company under these contracts will be limited to the following:

1. Spare Parts less Engines:

Boeing Model 707-131	\$10,000,000.00
Boeing Model 707-331	\$10,000,000.00
Convair Model 880	—NONE—

2. Ground Support Equipment —NONE—

HCT: HOUSTON

3. Customer Furnished Equipment \$ 3,500,000.00

TOTAL \$23,500,000.00

Within the limits of the monetary authority stated above, TWA is authorized to execute and deliver purchase orders in the name of Hughes Tool Company. The undersigned should be furnished with a copy of all purchase orders, and all amendments to purchase orders materially affecting price, but need not be furnished with miscellaneous correspondence in the administration of the purchases. When deliveries are made to the satisfaction of TWA, statements approved by TWA should be transmitted to the undersigned for payment. For planning

Exhibit A 29

purposes we should also be furnished with any schedules or estimates prepared by TWA relevant to deliveries and payment dates.

For the time being, we prefer not to authorize any purchase commitments in connection with the Convair 880 program. When it becomes necessary to place orders for any material quantities of spares or CFE for the Convair aircraft either to protect delivery or price advantages, please notify us promptly and we will obtain either authority or instructions concerning such purchases.

We assume that the purchasing activities contemplated by this proposal will be conducted by TWA personnel regularly engaged in such work and that the additional overhead expenses thereby incurred by TWA will not be significant enough to justify a separate accounting. In the event that for any reason TWA does not ultimately use any of these aircraft, Hughes Tool Company will reimburse TWA on some reasonable basis for such overhead costs.

If this proposal is acceptable to TWA, please so acknowledge on the copy attached.

Yours very truly,

C. H. PRICE

CHP:bp

Approved on Nov. 11, 1957
TRANS WORLD AIRLINES, INC.

By Carter L. Burgess
President

cc: Mr. George Spater
Mr. R. W. Rummel
Mr. R. A. Cook

EXHIBIT A 31

Telephone Conversation JAC—RWR

Management position (RWR) 1956

1. Not interested at \$4,000,000.00
2. Thinks it is best airplane for TWA if purchased in realm of \$3,100,000.00
3. Thinks market is limited but on information that PAA will buy 30 thinks Convair may sell 150 ships and therefore recommends going forward with the deal provided contract is changed to exclude "fundamentally dissimilar" and substitute "outgrowth of design"
4. If contract is not so changed recommend not purchasing these aircraft

Added items—CAA insured for \$20,000 to \$25,000 but would not hang deal up on this.

EXHIBIT A 33

12/30/59—Ben Sessel

1) Holliday swaying Sessel & B. of A. revised HTC figures Holliday advised Ben they show crisis for Jan. 7 or 11 when next Boeing is due to be delivered in amount of about \$2,500,000.00—needed.

Next three months HTC will need \$29,000,000.00—HTC then plan \$2,000,000.00 & spares TWA is buying up to 31+

2) Bill Gay called Sessel to ask him whether he believed HH understands B. of A. isn't putting up any more money. Asked Sessel to ask Carver to call HH. Sessel said Carver would not call HH again or this was his opinion.

3) Charlie Thomas called—very upset about Lockheed discussions. Sessel advised Thomas to tell HH TWA won't take Electras. Thomas said he couldn't do this. Decided to wait until January 7, Directors meeting.

4) Sessel would pass on to Gay word that we were working on a revised plan which he thought sounded very interesting because it would add up to a less potential dilution. Gay is to pass this word on to HH in hopes he may call Brandi.

EXHIBIT A 35

HOLLIDAY, RAYMOND

Mon., 2/20/61

3:30 p.m. Regarding GE engines—have been advised by GE that if HTCO wants to cancel the ten excess CJ805's it must do so by Monday 2/20.

4:00 p.m. Advised.

7:30 p.m. Cancel the engines provided we have the privilege to reinstate.

Regarding the Convair negotiations: I urge as follows: Regarding the claim that I would take AAL specs for the model 600's—this is true as to the original specs and at no time have I indicated any hesitation or uncertainty concerning the acceptance of the original AAL specs. At no time did I say that HTCO would take any subsequent change orders placed by AAL without approval of same first.

Convair's argument "why obtain TWA's opinion regarding 3% of the airplanes when TWA will not accept the other 97% is completely improper for the following reasons:

It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problems; most likely HTCO will control TWA when that matter comes up.

In any event, it is not Convair's worry; the 97% is HTCO's problem.

Now, regarding the 3%; Convair is mistaken in saying it is HTCO's fault that this matter was not resolved because HTCO failed to give decisions; this is an invalid and improper decision which Convair is seeking to take; for this reason we do not want these 3% of changes. We have

Exhibit A 35

a signed specification and that specification is the airplane we want. Failure by HTCO to accept changes ordered by AAL simply means by omission that HTCO has elected to take the airplanes without any changes and contractually unless you and R. Cook have permitted a default by failure to make payments, Convair is obligated to give us the airplane in accordance with the original specifications.

If Convair says HTCO has failed to give a decision with respect to the change orders the answer is simply we failed to order the changes when offered and therefore I say again we elected not to take the changes and this is the way we want the airplane. Convair has no right whatsoever to bill HTCO for the 70 thousand dollars. HTCO demands the airplanes according to the original specifications and does not want any of the changes.

At no time have we agreed to take blanket changes by AAL or any of them for that matter and I do not want them. In other words, Convair wants an answer regarding the change orders and here it is: The answer is no regarding all change orders regarding the original specs. Quite obviously Convair wants HTCO to accept these change orders in the interest of saving Convair money which naturally results from making the HTCO plans identical with the AAL planes. If Convair went ahead and put some of these changes into the HTCO planes it was done not because Convair thought we wanted them and not because Convair was uncertain as to whether we wanted them but simply because Convair wanted to

EXHIBIT A 36

7/11/60

Hughes has a razzle-dazzle deal on 600's.

Has orders for 4-880's. If Convair can sell these to others H. T. gets a substitute order (first call) on 4-600's. Tool Co. is supposed to lease 6-880's to N/E—Don't know whether these include the above 4—think not. In any event, gets either the 600's or 880's.

Total cost of 600's is \$26,061,768.00

Hughes has credit in these of \$6,515,442.00 from cash payment & some finegeling(†)

Additional cash outlay \$19,546,326.00 payable as follows:

7-31-61	\$3,257,721.00	1 plane del.
8-31-61	6,515,442.00	2 planes del.
9-30-61	6,515,442.00	2 planes del.
10-31-61	3,257,721.00	1 plane del.

Holliday in process of working out a cash flow sheet, through Sept. 1960—why no further. Holliday says can't go further. Kerr smells a rat—thinks may contravene HT loan agreement.

Holliday told Ben today that \$25,000,000.00 will fill bill for time being. Kerr confesses he is lost—wants to sit down with Holliday & find out just what intentions re: plane purchases.

Thinks someone should talk straight with Hughes re plans. Thinks maybe we should all sit down together.

B. of A. GORDON

EXHIBIT A 37

11-7-60

I was at home—RLG called about 11:30

11-7-60

RLG & NB called me. Crown deal appears to be "on" HRH thinks 50,000 shrs.—Crown 1,500,000—now down to 500,000 shrs.—HRH wants a ceiling & right to buy Crown's option. Bob suggested Merrill Lynch as an arbitrator.

Bob talked to Kerr already (Kerr & Ben are not together on this—maybe a moratorium)

Cook in San Diego to close NE deal—HRH gave in to G. D. on price on 600's. No progress on sale of 14-880's. If Crown won't go Merrill as arbitrator HRH will call Bob.

Pat called RLB & Bob encouraged him to go ahead. Tucson appraiser (Valley Bk.)

		Val. over \$10,000,000
11,000 acres—	raw land—	\$10,000,000
Houston	14,450	
CC	53,000,000	

Greg called—Ready to draw agreement—Crown wants us there. All in complete agreement. Time at 2:30 Bob told Kerr who will tell Grant Keehn

10 PM HRH called—I was in bed—want to arbitrate—I told him Crown protested & we feel better to settle now—he seemed irritable & adamant. I told him to call us am.

B. of A. CARVER

EXHIBIT A 38

**Questions—ask Howard Hughes
Equipment Program**

In 4 mos from 8-29-60 H says that he plans to sell 15-131's to Amer. Airlines & take their position in 600's.

He may cancel 880 order checked 720's in flight, 880 is faster than 720's. He wants theirs if he can raise more.

1. Who is to own the planes? (20-25-30—880's)
he doesn't care—TWA OK
ordered 30 & 7 Capital—last are 22 M i.e. improved
880—option of 1 more.
2. How is it planned to finance their purchase?
3. Thirty 880's were ordered originally. TWA was to take 20. Hughes Tool Company was to retain 5. What about the other 5?
4. What does the Tool Company intend to do with the five 880's (or 10 as the case may be)?
6 to go to NE—H H will buy 6-600 to replace these—
i.e. with 11-880's—trade them or cancel
5. How are the five 880's (or the 10) to be financed?
6. What about the 880's in the Capital deal?
 - a) How many are there? (7).
 - b) Is it planned to integrate all or any portion of these into TWA?

Exhibit A 38

7. Are any of the original 30—CV880's intended for North-east Airlines?

Convair will lease to N East

8. If so, how is it expected that these will be financed, by whom and when?

30—880's

6—N E

24—N East. planes—of financing covers 20 of these.

B. of A. CARVER

A-205

EXHIBIT A 39

9-15-60

OK

RLG

9-15-60

H.H. had a battle with Ray Cook about not getting into the meetings etc. Finally HH said he is fed up on this thing. Jack Naish said no one trying to put the deal together—Jack said. Cook left out—Leslie in hospital & representation not adequate. —H. has said Cook & Holliday should represent him. Result—he has full authority—gave him news in full detail with authority to act. has given 2 days to get some action.

H. again off of Ben S.—I diverted—

Ironical that. HH equity control is real bad yet TWA has 880 & Amer & United have Electras. TWA only big line that. hasn't Electra's. H.H. says this accident not related to others but the public doesn't.

H.H. would prefer not to finance the 6-600's. but let Tool Co do it at a later date—Maybe 600's won't ever go to T.W.A.—6 not enough to do anything with

Prefer to do only 880's.

Capital—will do 10,000,000 with GD for 3½ years—HH still is not convinced he can't insist on 7 years—

A-206

Exhibit A 39

They dealt with atty since fired by Cook's firm.

Will get some money out of charity 1 way or another—
maybe a loan 7 repay \$18,000,000.

9-15-60—Bob Kerr told RLG that figures & new plan will go out tonight so should have Friday

Cook called Bob about HH's talk. H feels Cook should be in the discussions more—(Kept out by design.)

B. of A. CARVER

A-207

EXHIBIT A 41

AMENDMENT No. 1

to

Purchase Agreement dated 10 November 1960

by and between

GENERAL DYNAMICS CORPORATION
(Convair Division)

and

HUGHES TOOL COMPANY

THIS AGREEMENT (hereinafter called "Amendment No. 1") entered into as of this 22nd day of February 1961, by and between GENERAL DYNAMICS CORPORATION, a Delaware corporation, having an office (Convair Division) at San Diego, California (hereinafter called "Convair") and HUGHES TOOL COMPANY, with its general offices at Houston, Texas (hereinafter called "Buyer"):

WITNESSETH:

WHEREAS, Buyer and Convair have entered into a Purchase Agreement dated 10 November 1960 relating to the purchase and sale of six (6) Convair 600 aircraft (said Purchase Agreement hereinafter referred to as the "Agreement"); and

WHEREAS, Buyer and Convair now desire to amend said Agreement to provide for the purchase and sale of seven (7) additional Convair 600 aircraft; and

WHEREAS, Convair's Detail Specification Report No. ZD 30-010 dated 1 August 1958, Revision 4, dated 16 November

Exhibit A 41

1960, together with Addendum III dated 3 May 1960 referred to in the Agreement does not properly describe the aircraft which are the subject matter of this Agreement; and

WHEREAS, Buyer and Convair desire to amend said Agreement to properly describe said aircraft and to otherwise reflect the agreement of the parties hereto;

Now, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree to and do hereby amend the Agreement as follows:

1. By deleting paragraph (a) of Article 1 in its entirety and substituting in lieu thereof the following new paragraph (a):

"(a) Six (6) Convair 600 aircraft (hereinafter called "Group A Aircraft") and seven (7) Convair 600 aircraft (hereinafter called "Group B Aircraft"), both groups sometimes hereinafter collectively called "Aircraft". Such Aircraft shall be manufactured by Convair in accordance with the terms of this Agreement and Convair's Detail Specification Report No. ZD 30-010 dated 1 August 1958, Revision 4 dated 16 November 1960, together with Addendum III dated 3 May 1960 and Report ZM-645 dated 11 January 1961, revised 21 February 1961 (hereinafter collectively called "Detail Specification") as set forth in Exhibit A attached hereto and made a part hereof, as the same may be modified pursuant to Article 5 hereof."

2. By deleting Article 2(a)(1) in its entirety and substituting in lieu thereof the following new Article 2(a)(1):

Exhibit A 41

"(1) The Aircraft shall be tendered for delivery to Buyer, serviced except for fuel, ready for flight, not later than the last day of the month set forth in the following schedule:

Group A Aircraft

<u>Month of Delivery</u>	<u>Number of Aircraft</u>
December 1961	One (1)
January 1962	Three (3)
February 1962	Two (2)

Group B Aircraft

February 1962	One (1)
March 1962	Three (3)
April 1962	Three (3)"

3. In Article 3, paragraph (a), by deleting the figure "\$26,061,768" and inserting in lieu thereof the following figure: "\$56,467,164".
4. By deleting Article 3(b) in its entirety and inserting in lieu thereof the following new paragraph (b):

"(b) Payments. The total price of the Aircraft purchased hereunder shall be paid as follows:

- (1) An initial installment payment applicable to Group A Aircraft in the amount of \$3,257,721, receipt of which is hereby acknowledged.
- (2) Two (2) additional installment payments applicable to Group A Aircraft as follows:

<u>Amount</u>	<u>Due Date</u>
\$2,606,176.80	February 1, 1961
\$2,606,186.80	May 1, 1961

Exhibit A 41

The above installment payment due February 1, 1961 may be made in the form of a negotiable promissory note bearing interest at the rate of six percent (6%) per annum payable to Convair and due and payable June 1, 1961.

- (3) An initial installment payment in the amount of \$5,827,700.90, together with interest thereon at six percent (6%) per annum from February 1, 1961 until paid, applicable to Group B Aircraft, upon execution of this Amendment No. 1. Said installment payment may be made in the form of a negotiable promissory note bearing interest at the rate of six percent (6%) per annum dated February 1, 1961 payable to Convair and due and payable June 1, 1961.
- (4) Two (2) additional installment payments applicable to the Group B Aircraft as follows:

<u>Amount</u>	<u>Due Date</u>
\$2,153,715.55	June 1, 1961
\$2,153,715.55	November 1, 1961

- (5) The balance of the Base Price of each Aircraft increased or decreased as the case may be by Change Orders, if any, pursuant to Article 5 hereof upon tender of delivery in accordance with Article 2 hereof, of each of the Aircraft manufactured in accordance with the terms of this Agreement and the Detail Specification."

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Exhibit A 41

Except as specifically amended hereby, all terms and conditions of the Agreement shall remain in full force and effect.

Executed in quadruplicate the day and year first above written.

GENERAL DYNAMICS CORPORATION

By

Title President—Convair Division

Attest:

HUGHES TOOL COMPANY

By C. H. PRICE

Title Vice President

.....
Assistant Secretary

A-212

EXHIBIT A 42

12-13-54

Ben Sessel

——— in L.A.

HH may have a 102 problem proposes now contract to buy 75 MM in planes from Lockheed (way ahead of DC-7) 3 MM cost each.

Standby 2½ or 3 yrs—for 35 MM thereafter TWA will take down

wants to confine it to bank in the personal loan

Irving will take 12 500 M only if planes are certificated or could be leased or sold to TWA

EXHIBIT A 44

December 23, 1954

CONFIDENTIAL

TELEPHONE CONVERSATION WITH MR. HUGHES THE EVENING
OF DECEMBER 22, 1954

Last evening, December 22, was the climax of several months' intensive activity which resulted in Lockheed signing contractual papers for the acquisition of twenty-five (25) Lockheed Model 1449A type aircraft by the Hughes Tool Company, with right of assignment to TWA by Hughes Tool, without Lockheed's consent.

It became apparent early in negotiations that the Model 1449A as proposed by Lockheed will be fundamentally uneconomical because the fuselage size will not permit carrying enough payload to produce sufficient revenue to have a reasonable break-even load factor. Seating capacity is virtually the same as previous models, while operating costs are substantially higher. Balancing this to some extent is the higher speed of the airplane which will tend to promote the sale of more seats than would otherwise be the case.

I have steadfastly maintained, and pointed out to TWA Management, who has concurred, and personally to Mr. Hughes, as well as to Lockheed representatives, that I believe the airplane as proposed to be an unsound project, primarily because of over-all economical aspects. I have also pointed out ways whereby this condition could be rectified by LAC making it an attractive, worthwhile project.

Numerous discussions were held with Lockheed representatives re operating costs during which period Lockheed raised its operating-cost-per-hour estimate from \$486.92 to

Exhibit A 44

\$541.95, TWA's cost-per-hour estimate being \$615.58. This compares to \$410.39 for the Douglas DC-7C. These cost figures included here are for domestic operation only.

During the evening of December 22, Lockheed centered its activities in the small walnut-lined conference room downstairs to the left of the lobby at the Beverly Hills Hotel, Hughes Tool Company occupying the Promenade Room to the right of the lobby. Hughes Tool representatives were Ray Cook and Mickey West. TWA observers and commenters were Harry L. West, Ralph L. Ellinger, Edward S. McCarthy and the writer. Lockheed representatives were Leonard Schwartz, Kirk Yost, Walter Wayman, Ben Brundred and Rodgers Donaldson.

I explained a second time to Ray Cook in the Polo Lounge immediately following dinner why any present deal should be made contingent upon final resolution of the specification satisfactory to both parties, why risk associated with CAA certification warranted special contractual protection, and that Hughes Tool should not consider Lockheed's price for the airplane firm because of the very incomplete airplane specifications. My personal estimate of airplane price relayed to Mr. Cook was that each airplane would cost approximately three million dollars when delivered, rather than the \$2,690,817.00 stated in the Contract.

The discussions with Ray Cook and Mickey West continued in the Promenade Room, during which time I pointed out that Contract LD-111 between TWA and Lockheed was handled in precisely the manner I was recommending in this instance, and that I estimated that this handling resulted in saving TWA a million and a half dollars in that instance. I also stated that much more would likely be saved in this instance if the same procedure were followed. In my opinion, LAC, if pushed, would have agreed to this

Exhibit A 44

contingency. LAC's willingness to go along with this condition was confirmed by Kirk Yost following the signing. He stated that LAC had approached Hughes several days earlier urging that no papers be signed until specifications were agreed upon and that Mr. Hughes turned this down.

During the discussions, Leonard Schwartz came to the door and advised Ray Cook that Mr. Hughes was on the telephone and wanted to talk to him. Cook asked that I accompany him to the telephone in the Lockheed quarters, which I did. Cook pointed out to Hughes that I had serious objections to the form of contract being proposed and urged Hughes to discuss these points with me. Mr. Hughes, who was calling from Palm Springs, where he had arrived late that afternoon, elected to talk to me.

Howard opened the conversation by asking what I had done about the price of seats. As background information, several weeks ago Mr. Damon mentioned in a telephone conversation with Hughes that Lockheed's price was less passenger seats. Mr. Hughes asked me a day or so after his conversation with Mr. Damon if Mr. Damon's statement was correct. I replied that it was my understanding that it was, but that I would re-check the specification status and determine whether seats were still called out as C.F.E. I advised him about one day later that seats were not included. That followed a conversation with Leonard Schwartz during which time Leonard explained how Lockheed had arrived at this position. I relayed all this to Mr. Hughes, after which he instructed me to follow pricing carefully in order to advise him later of how Lockheed had arrived at its final price, and whether or not I considered it fair. The morning of the 22nd Mr. Hughes instructed me by telephone to insist that LAC include passenger seats in the quoted airplane price. In reply to

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Hughes' direct question the evening of December 22, I stated I had talked to Schwartz about the seat price again, and that he had maintained his position. He then talked to Leonard Schwartz, who pointed out to Howard he was a little unhappy that this item should come up at this time, particularly in view of his earlier conversation with me on this subject. Leonard then advised Howard how Lockheed had determined that passenger seats were not part of the airplane price. The statements were essentially parallel with his earlier conversation with me, which I had relayed to Howard. Howard then talked to me again and stated that Leonard had explained how the price was arrived at, and he was satisfied.

I pointed out again, as I had done before on several occasions, including the morning of the 22nd, that the airplane specification, in my opinion, was not sufficiently complete to be suitable for use as a contractual instrument, and that I felt the most practical way to proceed in order to have the best possible negotiating position was to make the deal contingent upon resolution of specifications mutually agreeable to both parties by a date, such as March 1, or better yet, April 1, that being the estimated time required to do a reasonably complete job. I suggested the contract price could be tied to the specification as currently developed and made subject to additional reasonable costs or credits as specification resolution advanced. Mr. Hughes flatly rejected this proposal on the basis that he felt he must wind the deal up right away, and that he trusted Lockheed, that he believed Lockheed would do a good job, that he believed Lockheed would be fair because they knew that if they weren't we would not buy additional aircraft from them, that he felt I should be reasonable in my requests to Lockheed. I pointed out that what I was suggesting was exactly the form used

Exhibit A 44

in Contract LD-111 which resulted in a much better airplane for both TWA and Lockheed, and that the situation worked smoothly. He repeated that he felt he must conclude arrangements and that he thought Lockheed would do a good job and that the existing form of contract should be used.

I then pointed out to Mr. Hughes that in my opinion the airplanes would cost about three million dollars by the time they are delivered and that we were subject to high cost increases because of the pricing activities that Lockheed would indulge in as permitted by the proposed form of contract. Hughes stated that he had a verbal agreement with Bob Gross and Leonard Schwartz that Lockheed would not sell airplanes to others at a lesser price than to Hughes Tool, and that this agreement embraced the concept that if small quantities of airplanes were sold to other customers, that price differential in view of the relative quantities between such customers and Hughes Tool would be considered to exist in that appropriate price reductions from Lockheed would be considered part of his verbal agreement, and that for this reason he was not worried about the price.

I mentioned I felt the contract permitted unnecessary customer risk re CAA certification. He said with respect to CAA certification that he felt we should not raise this issue any further because Lockheed would do a good job in this regard.

I pointed out to Mr. Hughes that Lockheed intended to exclude the "Hell, No!" list of items, the accomplishment of which I felt was vital to building a successful airplane. Typical items included were lengthening the fuselage by a hundred and twenty inches to permit carrying additional payload, installation of four-wheel type main landing gears

Exhibit A 44

to permit use at otherwise restricted airports, further evaluation of structural characteristics in light of possible negative torque control failure, installation of power plant water injection, etc. Howard said he thought Lockheed would be willing to consider these items, and that they would be fair in their evaluation. He also stated that he felt Lockheed would cooperate fully. He asked that I contact him personally later on regarding any items that I felt Lockheed was being unreasonable on, and that he would handle those directly with Gross.

In closing the conversation with me, Howard again stated he trusted Lockheed and thought they would do a good job.

Following this conversation, papers were promptly executed by Lockheed and sent by special Hughes messenger to Houston to be available for the Hughes Tool Company Board Meeting today.

Mr. Hughes had negotiated a side letter agreement with Mr. Schwartz and Mr. Gross relating to the basic economy of the airplane. It stated in essence that the operating cost would have to be shown to be reduced by seven percent (7%) below the Lockheed estimated cost figure by March 1, or either party could cancel the contract.

s/ R. W. RUMMEL

RWR:JC

EXHIBIT A 45

5/25/61

Re: TWA—Notes of Meeting with Chester Davis
FHB & I met with Mr. Chester Davis at his request. He talked with us for over an hour. Most of his speech covered the events of the period since May 10th—and was largely a repetition of what he had stated in the May 19th letter. He emphasized his desire to get relations back on a satisfactory basis between him and his firm and his firm and Lehman. Other remarks which were, or may be, significant include the following:

1) He emphasized that he had a letter from HH personally appointing him as V. P. & General Counsel for HTC. He said he had made it clear to HH that this empowers him to make commitments for the HTC which would be fully backed up by HTC Board approval when necessary. He offered to show us the letter.

2) In response to a direct question from FHB, he said HTC was going right ahead in accordance with its agreements with TWA to accept the Sub. Debs. which it is obligated to take upon conclusion of the offering to stockholders.

3) He said that we should know that his client had every intention of doing everything he could to "bust up the Boeing deal".

4) He indicated that he believed most of the other "positions taken" in his letter could be removed—that certainly HH had no objection to our efforts as financial advisor or our raising funds for TWA (but not for the Boeings). He emphasized this point by asking why TWA couldn't raise the new funds on "open account" and

Exhibit A 45

then later decide what kind of planes it would buy. I explained that this simply wasn't a feasible way to finance in amounts of this size for an airline, even if TWA wanted to do it that way.

5) He volunteered that his client was worried most of all by the "Cahill study".

6) He said that he had insisted on the disclosure of HTC's possible positions vs TWA at this time for disclosure in the R.S. because if these disclosures were not made, HTC was liable as an underwriter and would therefore be effectively barring itself from raising the positions later if it allowed the R.S. to become effective without disclosing "its positions".

7) He asked if our three firms would be willing to sit down with him and Holliday to discuss a secondary on HTC's Sub. Debs. after they had them—say on or around June 15th. I replied that we had already advised Milner we would not say now that we would not be willing to discuss this matter at a future date but that what we would be willing to do at that time would depend on the situation existing at that time.

I emphasized that he was not in any way to construe my remarks as indicating that we would be willing to undertake this job for HTC. I emphasized that we were acting as investment bankers for TWA and that by his own statements at this meeting and in his letter of May 19th he had made it clear that HTC was taking an adversary position against TWA—threatening suits and stating positively that their objective was to "bust up the Boeing deal". Under these circumstances I asked him how we would possibly undertake the job for HTC. He said of course the situation

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might be corrected by June 12th. I said that was of course possible and that was why I was not taking the position that we would not be willing to take a new look at the situation in the future. I said however that our position could only be changed if both we and TWA were satisfied with the changes which had taken place in their position.

8) Just as he was leaving he indicated that HH would feel much better if he could persuade the voting trustees to allow him more representation of the Board by men of more stature than HTC's previous representatives. I pointed out the voting trustees had originally tried to work on a cooperative basis—the HTC representatives had not cooperated and that in any event this was not a matter in which we as investment bankers for TWA had any part.

EXHIBIT A 46

9-13-60

12

Hughes 4:30 he called Around 9/13/60

Leslie getting in men right away to work on the figures. Take \$15,000,000 if that would buy 3-22M's—When Convair would have to finance.

Told him physically impossible to get bank clearance in time to present to Equitable in time for Tuesday meeting.

6:40 pm: Talked to Sessel & told him about talks with Hughes, everything but name of X & terms of contract. \$22,000 deal, etc. Leslie on & \$15,000,000 deal.

Things to resolve with Keath:

I feel we shouldn't buy anything unless absolutely supported by figures. B of A being made to look bad on \$15,000,000 payment requirement. We should be ready to state whether we will stand pat or offer an alternative, depending on what the figures show.

There are at least 3 alternatives:

1. Go along with the Tool Company loans only and get into the TWA picture as running room develops. This would make the other banks happy. I don't like it much.

2. Accept the 22M vs 880 deal as proposed by Hughes, provided the figures make sense. This would give us an immediate pay down and would provide for extra payments on TWA loan as 880's are sold or better would necessitate reduced financing for TWA on 600's because of the introduction of new money into TWA from sale of 880's to others. This presents the possibility that the 880's may not be sold as planned.

EXHIBIT A 47

FORRESTER, Wm. A. Jr.

Fri., 10/28/60

12:30 p.m. (Per Opr) Get him on the line.

INFO They talked.

2:00 p.m. Call him back and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it.

2:30 p.m. Ans: Advised.

Mon., 10/31/60

A-224

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11:50 a.m. Must speak to HRH.

INFO Omit; they talked.

Wed., 11/2/60

8:20 a.m. Tell HRH I would like to talk to him. I think I've got a plan on a second problem of his which he asked me to think about and I think it will have a bearing on the first problem.

Wed., 11/9/60

12:25 p.m. (Per Holiday) Anxious to talk; at Mr. Gordon's request, Forrester is meeting with Gordon in the morning, and must talk before then.

2:15 p.m. Tell him that I have been on this deal with Crown and the Convair people this entire day and I am not going to be able to talk to him until tomorrow.

EXHIBIT A 48

12-4-60

At my option & keep secret.

When deal is done—then at our discretion we will return it to him. (Ask Hugo—do I take as officer or personally?)

His plan to try to get them to go w/o signing because if hazard to Trustee so try to do it w/o signing—If can't do it

(1) Execute Bills document & get it in NY by 9 AM Monday. This will be done.

(2) Our 2 documents depends on Irv. action. That we hold it in Trust is confidential. (Tell Greg) Has read all of the documents and he says if I make a representation to Irving he will go ahead

(3) At our meeting both of us will attend.

(4) When Doc delivered RLG will not be there.

3 things came to HRH attention this week—anti-DR.—

(1) 102 Tax situation—It is real bad & 3 weeks before year end. —M L is better—have c/h of Board & only need to get 1 man (Nixon?) so he would have to set out at once to refinance.

(2) Very Confidential—Will be a bill introduced & will pass Gov't financing of Air Lines similar to Feeder line financing.

(3) Another Tax matter

end talk 10:55

B. of A. CARVER

**Exhibits B and C to the Affidavit of John F. Sonnett
dated February 1, 1963**

[Doc. 167]

EXHIBIT B: A. V. Leslie's "TWA, An Appreciation"

TWA EXHIBIT 9

March 1960

TWA

An appreciation—

Background—

During 1956 Hughes Tool Company acting through Howard R. Hughes, placed orders for 18 Boeing 331, 15 Boeing 131 and 30 Convair Model 880 jet airplanes—(stated at the time, and reported many times since, to be for TWA use) plus spares and spare engines (somewhat later) in the order of 4.4 million. Total commitment was approximately 300.1 million.

R. W. Rummel, then Chief Engineer and now Vice President Planning of TWA and who is understood to be on Toolco's payroll, as well, acted for Hughes in negotiating the contracts and specifications and placing the orders for spares provisioning etc. for Toolco account.

It was stated by Hughes at the time the orders were placed (among others the writer) that TWA was not to concern itself with the financing of this equipment as he through Toolco, would find initially the required funds.

The first deliveries of this equipment, the 15 Boeing 131's took place during the period January—October 1959. Hughes not having arranged permanent financing, Toolco borrowed short term funds from Bank of America—Irving, using the airplanes as collateral and they in turn were leased to TWA on a day to day basis cancellable by either party on one day's notice. CAB granted approval of this

Exhibit B

arrangement as required under the Toolco control case of 1944 for a period until June 30, 1959 on the general understanding that within the period, permanent financing would be arranged.

Such leases also required the consent of the Equitable Life Assurance Society holders of TWA's 3¾'s 1969 of which 34 million were outstanding at that time (and 31 million at present). Equitable indicated that it would not approve such leases. Even so, the lease agreements were executed by Toolco—TWA but no lease payments have been made to Toolco; due to lack of necessary consent and accruals at year end were 8.3 million.

The planning of the Finance Department had assumed that the provisioning spares and spare engines for the program would be provided for in the long term financing package. Failing this however, Toolco during May 1959 requested that TWA purchase the 15 million of 131 spares required and this was done from current cash.

In this connection in May and July, CAB granted approval for continuance of lease to September 30, 1959 and for TWA to purchase Toolco spares and engines. On September 30, CAB extended right to lease the 15 Boeing 131 planes "until permanent financing arrangements are completed".

During November deliveries against the Boeing 331 contract commenced and five have been leased to date of March 9. Motion filed with CAB November 6, 1959 and granted 29 January 1960, providing for lease of 8 Boeing 331 and 8 Convair 880 planes and purchase of spares and engines therefor on order by Toolco. No time limit was placed on such leases.

The spares orders by Toolco for 12 Boeing 331's was 8.4 million, for engines 8 million and for 30 Convair 880's spares, 2.5 and engines 9 million. Some 5 million more of

Exhibit B

Convair spares must be ordered by either TWA or Toolco to place this fleet in operation.

During mid 1959 with lack of financing, Hughes achieved agreement with TWA (as the result of a study by Rummel) that it did not require the full block of airplanes on order. Thereafter 6 of the order for 18 Boeing 331's was sold to Pan American with proportionate spares and engines and TWA was given to understand it would receive but 20 of the 30 Convair 880's on order.

Thus TWA's present planning is predicated on a substantially lower number of planes than was thought necessary during 1956. The initial planning of TWA's jet needs appears to have been a matter of decision between Hughes and Rummel—approved by TWA and not an initial appraisal of needs by TWA concurred in by Toolco.

Failing long term financing Toolco has been able to handle the plan to date:

- (1) By pledging 18 of the 20 planes (15 Boeing 131's—5 Boeing 331's) against short term bank loans from Bank of America—Irving.

- (2) By sale of 6 Boeing 331's to Pan American.

- (3) By inducing TWA to purchase the Boeing 131 spares and spare engines, 15 million and to purchase 20 Boeing 331 spare-engines; 4.3 million—a total of 19.3 out of cash working funds.

- (4) By delaying the delivery of Convair 880's through the device of having them removed from the production line before completion. Three should by now be available to TWA for training. It is understood that contract delivery dates have been allowed to be set forward from March and April to May—which will delay scheduled service until July—missing the peak traffic month of June.

Exhibit B

(5) By putting forward the contract date for delivery of Boeing 331 airplanes—concomitant with the Pan American sale of February delivery date airplanes to April and March airplanes to May.

As of this writing, the banks appear to have refused to loan more funds (and may be up to their loan limit) and as of March 10;

(a) Two Boeing 331's which have been accepted for delivery for Toolco's account by TWA engineers are resting at Boeing since February 29, and March 4 without funds made available by Toolco for this purchase. Balance required approximately 8.2 million. Next plane is due for delivery April 24.

(b) A Link Simulator for the Convair 880 under Toolco order has been accepted for delivery by TWA Engineers without funds provided by Toolco. Balance of Purchase price requirement—\$375,000.

(c) Some 4.9 million of Boeing 331 spares and 7 million of Convair spares under Toolco order have been delivered to TWA depots. From the dunning received and passed on to Toolco—a major portion must be overdue in payment—with an additional 2.5 million scheduled for delivery during March.

Under present circumstances it is impossible for TWA to make any forward plans—for placing in service of the 20 Convair 880's and 7 Boeing 331's which were anticipated to produce a major part of system earnings during 1950.

Management of TWA is caught in a dilemma:

When and if the airplanes are delivered, trained staff must be on the payroll in all departments to care for the increased activity. Yet, there can be no justification for

Exhibit B

the costs of such staffing and purchase of needed spares by TWA on its own account if the equipment is not to be made available and on a timely basis.

Without the equipment it is probable that TWA will be financially embarrassed by the year end—since 1960 in any event, has been forecast as a year of but modest profit.

Despite the situation which exists with Toolco unable to meet obligations during the next six months of some 125 million of which some 30 million is due in the next 60 days, information has come to hand that Hughes is negotiating for a further large fleet of Convair jet airplanes of the 600 model.

Financing Negotiations to date.

During October of 1958, Hughes employed First Boston Corporation on a fee basis of \$25,000 per month to devise a plan for financing the TWA-Toolco jet program (Apparently the firm was suggested to Hughes by officials of Lockheed. Studies were made by this firm through December 1958. At that time George Woods, Chairman of First Boston, informed Hughes by telephone conversation that their work had progressed to a point that a face to face discussion and decision for definitive action was indicated. Hughes is said to have refused to meet Woods and First Boston then bowed out of the picture.

During February 1959 Hughes commissioned Dillon Read (along with Lazard-Lehman) to work up a financing plan with compensation entirely out of underwriting fee, if done. Finance Department worked closely with the Dillon Read group on the development of a plan which was passed upon as to Revenue and Earnings potential through 1961, by Coverdale and Colpitts.

Exhibit B

This has been called the May 18 plan. Hughes found fault with this plan and a number of variations were prepared, none of them acceptable to him. The last one was dated during August 1969 and since that time Dillon Read has done nothing. Nor has any other group.

Despite the passage of time and building up of a foreseeable financial crisis, TWA has not been given freedom to seek such financing with assurance of minimum equity supplied by Toolco necessary to support the practical maximum of debt.

As the situation stands, Toolco has run out of cash funds and bank credits with 125 million jet program requirements yet to be met, while TWA has spent some 53 million of its funds in provisioning ground support equipment, training and rentals with planes held only on a day to day basis.

It would be a euphemism to say that Toolco's immediate financial position is precarious.

To develop the argument

Assume Toolco shows a net profit after taxes from its Tool Division of	5,000,000
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In addition

Assume Toolco is borrowing 90 million at an assumed rate of 6% to carry airplanes etc. or annually	5,400,000
--	-----------

It is leasing airplanes to TWA at rentals per year of approximately	20,000,000
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Against these planes it can take depreciation of	12,000,000
--	------------

Which produces a nominal profit of	8,000,000
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Using interest as an offset to profit	5,400,000
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Net Profit on Lease account	2,600,000
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Income tax at 50%	1,300,000
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Net profit	1,300,000
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Exhibit B

However, since it is not receiving in cash any of the lease rentals due to lack of Equitable's consent, the net cash drain would appear as follows:

(1) Net profit of Tool Div.	5,000,000
Less interest on Borrowings ..	5,400,000
Income tax payable on profit not received	1,300,000
Cash drain for year	1,900,000

All this with a current minimum cash position, loaned up and 125 million of near term capital contracts to be paid for.

Assumed position of parties at interest:

Hughes-Toolco Banks

The banks concerned Bank of America-Irving, appear to have belatedly recognized the seriousness of the situation and have refused to make further loans without a firm long term financing plan. It may be presumed they keep as fully informed as need be and are forcing receivership for Toolco for certainly it is insolvent. They must believe that this is the only course that will lead to a solution of a problem which has developed as a result of their complacency in granting credit with no plans for repayment.

These loans appear to be money good in liquidation comprising jet aircraft pledged, having a cost of roundly 100 million—78% of TWA stock pledged with a market value upwards of 70 million, or total realizable collateral value of say 150-170 million, plus a general creditor position.

*Exhibit B***Equitable Life Assurance Society Position**

Equitable the chief creditor of TWA, as holder of 31 million 3 $\frac{3}{4}$ s 1969 wrote Hughes strong letters during 1958 and 1959, expressing their concern at the lack of a financing program. They had indicated to TWA in this connection that they would be helpful in a sound program. No replies to these letters have been received to date.

On November 25, 1959, TWA paid Toolco—12 million on a note which became due as its working capital exceeded 27,000,000, which occurred at the October month end. Equitable took exception to this payment of TWA funds (even though deemed a valid demand by Toolco—according to TWA counsel) and have reserved the right to declare a default. They question also the accrual of lease rentals on jet airplanes by TWA in favor of Toolco, inasmuch as the leases have not been approved by them and again have reserved the right in this instance, also to declare a default.

In a recent meeting of Cowie, Vice President Equitable, Cook, Personal attorney of Hughes, and the writer, Cowie indicated Equitable would not be inclined to agree to any financing plan in connection with which TWA used any of its funds to pay off Toolco investment in the jet program i.e., that this should remain in TWA as Equity support of any borrowings required.

On its face such a stand would prevent Toolco paying off its bank loans except by sale of this additional stock, some 110 million.

They are well aware of the pressure which is placed upon Toolco by its non-receipt of jet lease rentals accruing at a 20 million annual rate.

In a recent luncheon meeting of the writer with Grant Kheen, Executive Vice President, Equitable, he stated that he would not entertain the submitting of any financing pro-

Exhibit B

gram which did not carry approval of and necessary commitment by Hughes to carry through.

They recently refused to approve negotiation of lease of the unpaid for planes at Boeing on basis would only delay solution of overall problem.

Boeing certainly must be increasing its bank borrowings as a result of Toolco non payment. Their banks National City lead, Morgan Guaranty et al may counsel declaring a default—to free Boeing to sell to other customers or deal with TWA direct.

Boeing Position

Unknown—Toolco now owes them 8.2 million for 2B 331s not picked up and it is understood that there are overdue payments in excess of 1 million on spares delivered to TWA, for Toolco account. The 3rd airplane is scheduled for delivery about April 24.

Convair Position

Convair is eager to sell airplanes and apparently somewhat naive in dealing with Hughes.

(1) They have allowed time to take the first three of Toolco-TWA 880s off the production line in a manner which delays Toolco's necessity of payment (and harms TWA by denying it the use of the plans for its training).

(2) They have agreed to a delaying of delivery dates from March and April to May of some 5 planes (Exact number not known).

Exhibit B

(3) Despite the precarious financial situation of Toolco as set forth in this paper, General Dynamics president is currently discussing with Hughes the purchase of an additional block of Convair 600 model. The number is stated nominally 20 to 40—i.e. in dollar terms \$100,000,000 to \$200,000,000.

Convair is slated to have a training 880 ready for delivery to TWA March 14—no funds appear available for payment.

One might expect this would modify General Dynamics Convair rosy view of the situation when it will be in the same situation as Boeing. Again General Dynamics—Convair would be forced to draw on bank credits to cover non-payment—and prospect of non-payment against the balance of the contract.

Chase Bank—are the lead in General Dynamics—others are in—for example, Bankers Trust—who criticize the lack of information which has been provided about General Dynamics affairs. Chase may also counsel defaulting the contract and proceeding against Toolco.

TWA Counsel.

Chadbourne appears to be extremely concerned about TWA Management lack of diligence in making clear to Hughes the adverse effect on TWA through the lack of jet financing. They are proposing a letter to Hughes that Toolco give TWA an option to purchase the planes and equity support amounting to his current investment in the program and authorize TWA to work out its own problems. Chadbourne's apparent concern is the probability of successful minority stockholder action against TWA management and directors as well as Toolco—and Hughes if plane deliveries are not made on schedule due to lack of funds.

*Exhibit B*TWA President's position.

The President has had talks with Blyth and Company—Specifically Donald McDonnell (who is a director of General Dynamics)—concerning a plan which would finance the current jet program—plus 20 additional Convair 600s (at about 100,000,000). Blyth was asked to determine from General Dynamics the amount of subordinated debt they would take to make a plan feasible.

The plan supplied to McDonnell was Finance Department's No. 11. This plan was hurriedly put together as to the revenue side by Planning and costed out as to expenses by Finance. It is considered by the writer over optimistic as to revenues. For example—Coverdale and Colpitts would probably knock it down substantially as to revenue and profit.

Hughes is understood not to know of this TWA-Blyth talk.
Hughes

Hughes is known to be talking with Johnson, General Dynamics President about purchase of additional Convair airplanes of the 600 series.

He is known to be talking with Keath Carver about loans and getting nowhere.

He is working on a program for TWA advertising with TWA's agency—Foote, Cone and Belding. Meanwhile TWA had had no newspaper or magazine advertising since February 11. It is improbable that F.C. & B would release any advertising if so directed by TWA without Hughes approval.

*Exhibit B***C.A.B.**

The C.A.B. have been complacent about the lack of financing to date.

However, default by Toolco on its contracts is bound to come to light shortly and it will be compelled to review Hughes control. If his control has worked a hardship on the company and its minority stockholders, it probably would deny his holding of stock voting rights. This would result in a new Board of Directors for TWA, made up of minority stockholders. There are no sizable blocks. Although much stock is in street names—probably not more than 10,000 shares in any individual holding. —Merrill Lynch—largest street name holder.

TWA position

From a recitation of fact and surmise concerning the magnitude of the problem and the stake and relative position of the parties at interest, what should be expected and anticipated.

(1) Toolco-TWA jointly have resources at their disposal to finance the current jet program and this without a diminution of Toolco-78% control.

(2) Despite this Hughes unwillingness to face the problem, leaves no time for a plan to be devised before the creditors move in.

(3) No insurance or banking group would finance TWA unless TWA were defended against Hughes in the future—that the current situations might not again occur.

Exhibit B

(4) TWA current Board of Directors are straw men—and thus will take no action unless forced to by Counsel. Counsel in turn are forced to demand action of the Board to protect their professional standing—or failing action to resign.

(5) Toolco banks will loan Hughes no more money.

(6) Equitable will not allow a transfer of loans to Toolco over to loans to TWA in connection with jet programs.

(7) Aircraft manufacturers have major funds involved which can only be paid off through TWA operation of the planes. Finally, Toolco is insolvent and headed for early receivership. This would be caused by small vendors to Toolco upon public knowledge of his inability to pick up planes when?—within two weeks or by March 20.

Action indicated upon appointment of a receiver for Toolco and Hughes individually.

(1) Banks would immediately move to reduce collateral to possession—i.e., Leases would be denounced and Marshals ordered to seize planes, wherever they might be. This would be first step in negotiating a new lease with TWA with banks as owners of airplanes. As far as TWA is concerned at this point, Bank of America-Irving are adversaries, therefore

(2) TWA would immediately confer with Equitable as to advisability of appointing a receiver for TWA. This might be indicated for a short period.

(a) To defend TWA against unreasonable lease agreement with banks.

(b) To provide: a rallying point where all parties at interest could be brought together.

Exhibit B

(3) Equitable has a poor collateral position and will probably be required to put up additional funds to work out of situation. Therefore they are the key. Possible they might put up funds and take control without receiver.

(4) TWA should, with Equitable, immediately bring together Boeing, Convair-Pratt and Whitney and General Electric.

Suggest that they all declare defaults on contracts to free them up to work out a plan of permanent financing and still retain their progress payments.

(5) TWA with Equitable should sue Toolco-Hughes for damages—implied contract default.

Sue against payment by TWA of 12,000,000 on ground this was demanded with receivership of Toolco anticipated.

(6) Plan should be based upon each party at interest taking slow motion money to extent of 50%.

A possibility

Program—30 Convair—12 Boeing 331s—15 Boeing 131s—Spare Engines etc. 385 million market value—securities to be issued.

	<u>Cash</u>	<u>Bank Loan</u>	<u>Ins. Co. New</u>	<u>Inc. Deb.</u>	<u>Equity</u>
Banks—80 MM		61-66	66-76	61-76	
Hold 20 planes as collateral for Toolco loan—		unsec.			
Sell to TWA at 100 MM					
Cost approx. 110 MM		50		50	
Convair—30 880s 128 MM					
Less progress payments					
28—net 100 MM	50			50	

Exhibit B

	<u>Cash</u>	<u>Bank Loan</u>	<u>Ins. Co. New</u>	<u>Inc. Deb.</u>	<u>Equity</u>
Boeing 7-331s @ 299					
Less progress payments					
5 net 24 MM	12			12	
General Electric 58 en- gines 9 MM	4.5			4.5	
Pratt and Whitney 20 engines 4 MM	2.0			2.0	
TWA to fund purchase of spares to be delivered	10.0				
Toolco					
Lease Rentals to date				13.0	
Dec. 1, 1960—note plus interest				6.4	
Spares hitherto deliv- ered to TWA				5.0	
Total	78.5	50	78.5	118.5	24.4

Cash is provided from
new insurance company
loan of 78.5

Amortization of Debt

50 Bank Loans—Ins. Co. Loans— 15 yrs	Unsecured 61-66	Per A 10 MM
78.5 Insurance Co. loans 5¾%	66-76	
Unsecured Negative pledges 5-15 years		7.85 MM
27 Equitable new rate 5¾% 1-8 years	61-76	3.0 plus

Exhibit B

118.5 Junior Debt 2% fixed
1-15 yrs.

7.9

3% noncum. after \$1 per share on
stock and if working capital
over 35 MM

Payable only if earned and work-
ing capital over 35 MM cumula-
tive as to max. 15%

		Years	
Debt Mat. Fixed	61-66	66-69	70-76
Bank	10.0		
Equitable	3.0	3.0	
Ins. Cost.		7.85	7.85
Total per year	13.0	10.85	7.85
Junior Debt	7.9	7.90	7.9
Total per year	20.9	18.75	15.75

Depreciation on Irt. equip. approx 30—Piston 20 initial
years.

Program 30 Conv. 880s Pro forma Capitalization
15 Boeing 131s
12 " 331s
57 Total Value—385 mill.

Capitalization as of total issuance of debt about Sept. 30,
1960

* Equitable (3¾s) 5¾s 69	27
* Insurance Loan 5¾ 76	78.5
** Bank Loans Serial 61-66 5½%	50.0
	<u>155.5</u>

Exhibit B

Income Debentures 2% Fixed—5% max.	118.5
Equity	
At Present	117.0
New to Toolco	24.0
Total Equity	<u>141.0</u>
Total Capitalization	375.
Senior Debt % of Junior Debt plus Equity 60%	

• Redo—secured by general mortgage

•• unsecured

What kind of a beating does Hughes take—

Bank Loans of	80MM
Banks sell TWA Equip.	
Banks get a TWA	
Credit worth	50
Banks—Sell Inc. Debs. 50M @ 60	<u>30</u>

They are home and free and Hughes is free of 80MM bank loans.

He has lost

Convair down payment	29
Boeing “ “	<u>4</u>
	33

Lease rentals	13.0
TWA obligation	5.8
Spares Purchases	<u>5.0</u>
Total	<u>56.8</u>
He receives in TWA stock	<u>24.0</u>
Net Loss	<u>32.8</u>

and control of TWA

Exhibit B

CAB

CAB

Set up meeting with CAB to explain situations from TWA's point of view—Keep Equitable informed.

Minority Stockholders

Talk with Merrill Lynch—Forrester and get them to organize a minority stockholders group—and a new Board of Directors—favorable to TWA management—Keep Equitable informed.

Above all—A party at interest meeting—venue preferably Equitable offices—Not to break up until a firm commitment.

Note A. Probable that Equitable would agree to increase participation to 50 MM or by 23 MM—if so need only 55.5 new insurance money—Let Merrill Lynch handle.

Note B—Possibly roll over 50 MM/Bank of America—Irving with a 50 MM headed by Morgan Guaranty—Mellon-Bankers Trust—Pay off Bank of America—Irving
Note

Management

E.O.C.—Entirely qualified as Overall Operating Executive—In any case need capable financial officer—which exists.

Notes March 11

Thomas sending to Sessel copy of his plan—envisioning financing of plus 20 600 Convair planes

Exhibit B

It has been planned to have Keath Carver to present this to Hughes as his (Carver's) plan.

Thomas talked with Johnson, G.D. yesterday and he appeared agreeable—though hedge cloused that he would need to talk with Convair's Johnson—has been talking with Hughes about a 30-880—30-600 plan

Hughes has said to Sessel he was devising a plan and no one else should get in act. This was for 30-30 and he would guarantee acceptance by TWA.

Link Simulator passed for acceptance by TWA and Toolco notified yesterday. This requires \$375,000 payment by Toolco.

EXHIBIT C: Affidavit of J. William Bew

[CAPTION]

61 Civ. 2324

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. WILLIAM BEW, being duly sworn, deposes and says:

I am J. William Bew, Manager, Equipment Specifications and Acceptance, of plaintiff Trans World Airlines, Inc. (TWA). I make this affidavit in opposition to defendants' motion to dismiss the complaint in the above-entitled action.

In June of 1957 I was designated as Special Representative of the Hughes Tool Company (Toolco) and stationed at the San Diego, California plant of Convair Division of General Dynamics Corporation (Convair). My specific job was to administer the Purchase Agreement between Convair and Toolco for the purchase of Convair 880 aircraft as Toolco's factory representative. Throughout the period described in this affidavit I remained stationed at the Convair plant and performed the duties outlined above. Throughout the period of my employment at Convair I received my instructions from and carried out the orders of a number of persons associated with or controlled by Hughes and Toolco and Howard Hughes personally. It is my belief that Mr. Hughes personally decided all major questions of policy.

As of mid-1959, the Convair production line for 40 Convair Model 880 aircraft, 10 of which were scheduled for delivery to Delta and intermingled with those to be delivered to Toolco, was on schedule and deliveries were expected to commence in the fall of 1959.

Exhibit C

In September 1959, the TWA test flight crew was stationed in San Diego, California, preparatory to making test and acceptance flights of Convair 880 aircraft.

Under normal production line sequence, the Convair aircraft moved from primary assembly point to final assembly point and then to the flight line. Following flights by Convair, the aircraft would be tendered for delivery, contemplating final inspection and test flights by the customer.

The production line sequence was that subs or sub-assemblies flowed toward the line where they were mated in this order: wing halves mated, overwing barrel section, forward fuselage section, aft fuselage section, engines and pylons, empennage or tail section, then finally to where interior and paint were applied. The ship then moved out of the hangar to be weighed, systems checked out, taxi test, production flight test, FAA ticket, tender of delivery, customer inspection, pre-flight and acceptance flights.

On June 9, 1959, I advised TWA by teletype that Convair's production line was on schedule and that aircraft would proceed to Field Operations as scheduled. However, I also advised that Convair had, in my opinion, already used up the cushion time factor planned for development modifications.

On July 30, 1959 inspectors employed by Toolco arrived at the scene and observed the progress of various aircraft.

On August 6, 1959, the Toolco inspectors began to show a particular interest in aircraft Nos. 5 and 6.

During this period there were approximately 15 aircraft on the floor of the Convair plant. Thus, aircraft No. 15 had reached the stage of production whereby wing and overwing barrel had been mated.

Exhibit C

The first four aircraft (Nos. 1-4) were to be placed in a test program to enable the necessary certification by the FAA. Hence, it was assumed that Toolco aircraft Nos. 1, 2 and 3 would be worked into the delivery schedule at a later date. Aircraft No. 4 was to be delivered to Delta.

Aircraft Nos. 5 and 6 were scheduled for delivery as Toolco aircraft in November and December 1959 while Nos. 8, 9 and 10 were scheduled for delivery in January and February 1960. Aircraft No. 7 was scheduled for delivery to Delta in January 1960.

These delivery schedules had been set forth in Amendment No. 1 to the original Purchase Contract. This Amendment was to schedule deliveries as between Toolco and Delta. It apparently was not signed by Toolco although a related amendment was signed by Delta.

On October 5, 1959, Toolco placed aircraft No. 5 under guard.

On October 11, 1959, I was directed not to ever indicate any final acceptance of any aircraft.

On October 12, 1959, I advised TWA that aircraft No. 5 remained unmoved from the weighing scales where it had been placed on October 9th. Convair refused to work on the aircraft while it was in this location and on Mr. Hughes' orders the Toolco inspectors did not allow it to be moved.

Before aircraft No. 6 was placed under Toolco guard, a new prototype seat was installed by Convair. Later, after Toolco guards took control of the plane neither Convair nor TWA were able to board the aircraft for any purpose, including the removal of the prototype seat. Hence, continued development and production was stalled. Despite repeated requests of Toolco representatives, Convair was unable to remove the prototype seat and another prototype had to be developed.

Exhibit C

In December, 1959, Toolco guards at the Convair San Diego plant took control of aircraft Nos. 5, 6 and 8, placed ropes around such aircraft, and all work on such aircraft stopped. It was anticipated that these planes would be the first tendered to Toolco for delivery.

On December 7, 1959, I advised TWA that these aircraft had been taken over by Toolco guards and that neither TWA nor Convair personnel could get aboard them. As a result of the placing of guards and ropes around these planes, my department was unable to board them. Hence, TWA was unable to finish its necessary inspections and Convair could not complete the outstanding work.

Throughout January 1960, I was directed to ask that Convair advise me of all contemplated demonstration flights on 880 aircraft. In addition, I was directed to tighten up control over the use of flight test aircraft.

On January 31, 1960, aircraft No. 7 was delivered to Delta Airlines.

In February, 1960, Hughes caused aircraft Nos. 5, 6 and 8 to be placed in bailment, thus removing them from Convair control. Aircraft No. 9 was placed under the control of Toolco guards so that no further work could be performed on it by Convair or inspections made by TWA. Aircraft No. 9 was subsequently bailed and all these aircraft were towed away from the Convair plant.

On February 12, 1960, I received instructions from Mr. Gay, an associate of Mr. Hughes, that only authorized and necessary personnel should be allowed on board the flight test aircraft. This direction was extremely difficult to accomplish and Convair stated that curtailment of demonstration flights would make it difficult for them to promote sales. It should be noted that the rebate proviso to the Original Purchase Agreement provided that each additional

Exhibit C

sale of an 880 aircraft or models derived therefrom would operate to lower the price of the Toolco 880's.

On February 15, 1960, representatives of American Airlines and Braniff Airways requested a ride on No. 5 aircraft. Our general directive to Convair was that all such requests should be refused and I understood from Mr. Owens, another Toolco representative, that this request was refused.

On February 22, 1960, I was instructed to place an agent on guard at each aircraft which might be used for flight to prevent the demonstration of any such aircraft to would-be purchasers.

By this time Hughes had assumed direct control of all early deliveries and put them under guard.

On February 22 and 23, 1960, TWA's representatives at Convair were ordered to refrain from participating in any discussions with Convair or any one else in regard to delivery schedules.

On March 1, 1960, I advised Mr. Price, the chief Toolco representative and also Mr. Gay that action should be taken to preserve the engines on aircraft Nos. 6 and 8. No action was taken, and at least as to No. 6, the engines became corroded. The Toolco guards would not even allow General Electric employees to take care of the engines.

Throughout the month of March, 1960, and continuing thereafter, Toolco personnel made a sustained effort to stop demonstration flights of Convair 880 aircraft.

In March, 1960, aircraft Nos. 13, 14, 15, 18 and 19, being the next Toolco aircraft in production (Nos. 16 and 17 being for Delta), were pulled out of production and stored on the Convair flight line.

Aircraft No. 5 was to be used for testing purposes and as part of Convair's FAA air worthiness certificate proce-

Exhibit C

dures. Under the bailment agreement it was to be returned to Convair in March. It was not redelivered by Toolco until September 13, 1960.

In March, 1960 Toolco obtained a change in the scheduled delivery dates by Amendment No. 4 to the agreement between Toolco and Convair. This provided that deliveries should not commence until May, 1960.

In May, 1960, Convair received the FAA air worthiness certificate by use of such aircraft as still remained within its control. Aircraft No. 10 was delivered to TWA as a training aircraft on May 18. An agreement providing for the assignment of 20 Convair 880's to TWA was not confirmed by Hughes and Hughes continued to exercise control over all 880 aircraft on order by Toolco.

Aircraft Nos. 11 and 16 were delivered to Delta on May 4 and on May 6th respectively.

The Assignment Agreement purported to assign to TWA aircraft Nos. 8, 20 and 22. These aircraft were subsequently delivered to Northeast Airlines.

On June 6, 1960, I was advised by Mr. Rummel, another Special Representative of Toolco, that no tests were to be made on Toolco's aircraft either by Convair or by TWA.

In June 1960, aircraft No. 20 was flown by TWA. Such flights were stopped by Toolco. Aircraft No. 20 was then stored.

Aircraft No. 17 was delivered to Delta on June 2, 1960.

The status of aircraft as of this time was as follows: Nos. 24, 12 and 25 had been flown by Convair, No. 22 was in Field Operations being prepared for flight and Nos. 26 and 27 had been moved out of the hangar and system checks were being conducted.

Exhibit C

During July and August work on Toolco aircraft was slowed down. Convair began taking weekends off. At TWA's insistence Convair conducted engine modifications, dropping engines for up-dating, fuel consumption flight tests, and single hydraulic system flap operation. In general, TWA attempted to have Convair up-date the aircraft.

Following the withdrawal of Mr. Thomas as President of TWA, the morale at Convair hit rock bottom. Shortly thereafter Hughes arrived personally and flew aircraft Nos. 3 and 26. Hughes gave instructions that no further acceptance flights should be flown except as he directed. He wished to be present when all such acceptance flights were made.

During this period aircraft Nos. 12, 22, 23, 25, 26 and 27 were tendered by Convair for acceptance flights. Following the refusal by Toolco to allow such flights these aircraft were stored making a total of 12 aircraft in storage in various stages of completion.

Aircraft Nos. 21 and 29 were delivered to Delta on July 5 and August 5, respectively.

During September and October of 1960, Convair tendered aircraft Nos. 28 and 30 for acceptance flights and upon refusal such aircraft were placed in storage. Convair ceased work on all aircraft on order by Toolco and began a substantial layoff of personnel. Aircraft Nos. 33, 34, 35 and 39 were pulled off the production line in October, 1960 and work stopped.

Aircraft Nos. 36 and 38 were delivered to Delta on October 1, and October 10, respectively.

The four bailed aircraft were finally returned from bailment by October 21, 1960.

Had Amendment No. 1 to the original Purchase Contract been adhered to all thirty aircraft would have been delivered to Toolco by the end of September, 1960.

Exhibit C

In November of 1960 Mr. Raymond Cook came to California and entered discussions with Mr. Digges of Convair which resulted in the reduction of Toolco's order of 880 aircraft from 30 to 24, thus making possible the Convair lease of Nos. 5, 8, 12, 20, 22 and 23 to Northeast Airlines and the firm order by Toolco of 6 Convair 990 aircraft in American Airlines configuration. Mr. Cook designated the aircraft which Northeast was to acquire. These aircraft were delivered to Northeast between November 1960 and January 28, 1961.

In December of 1960 Toolco assigned 19 Model 880 aircraft to TWA, one 880 aircraft having been previously purchased by TWA with its own funds in May of 1960. Of the 19 aircraft assigned only 16 had been designated by number and the remaining three were designated in 1961 out of the seven 880 aircraft still on order by Toolco.

Deliveries of Convair 880 aircraft to TWA commenced in January 1961 and were completed on October 13, 1961.

During the period outlined above I was aware that Convair was putting into production numbers of Model 22 M and 600 (990) jet aircraft. Although I was aware of some interest on the part of Mr. Hughes in regard to these aircraft, I received strict instructions not to inspect, discuss or even recognize the fact that they were on the production line.

/s/ J. WILLIAM BEW
J. William Bew

(Sworn to on January 31, 1963.)

Pretrial Order, February 1, 1963

[Doc. 168]

[CAPTION]

61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held in the above action on January 28th, 1963 at 5 p.m.

Four matters were presented to the court for consideration:

1. A motion by the defendant Hughes Tool Company, returnable February 8th, 1963 at 4 o'clock, to adjourn the deposition of Howard R. Hughes presently scheduled for February 11th, 1963 until after a final adjudication of said defendants' motion to dismiss the complaint. This motion was advanced for argument to January 28th, and on the record of the pretrial conference, the attorney for Hughes Tool Company withdrew the motion.

2. A motion by the plaintiff Trans World Airlines to withdraw its motion to dismiss the counterclaims, except that portion of said motion which attacks the second counterclaim for failure to state a claim and the motion for summary judgment with respect to the sixth counterclaim. This motion is granted and plaintiff is directed to file its reply to the counterclaims of defendant Hughes Tool Company within ten days after the conclusion of the deposition of Howard R. Hughes.

3. A motion by the additional defendant Charles C. Tillinghast, Jr. for leave to answer the counterclaims of the defendant Hughes Tool Company ten days after the conclusion of the deposition of Howard R. Hughes. This motion is granted.

Pretrial Order, February 1, 1963

4. A motion by the defendant Hughes Tool Company to review an order of the Special Master dated January 22nd, 1963 requiring the defendant Hughes Tool Company to produce for inspection and copying the so-called tax documents. As to the nine boxes of papers which the court is informed may contain pertinent documents in relation to the request to produce, the defendant Hughes Tool Company is directed to send them today to counsel for the plaintiff, who shall make arrangements for producing copies thereof for the plaintiff and the additional defendants. If the defendant Hughes Tool Company contends for some reason or other that said documents are not subject to production, then the nine boxes shall be sent today to the Special Master, who shall rule upon any objections that the defendant shall make to the production of specific documents. Any other documents subject to the notice and affidavit of January 9th, 1963 shall be produced on a daily basis on or before February 11th, 1963.

So ORDERED.

Dated: New York, N. Y.

February 1st, 1963

CHARLES M. METZNER /s
U. S. D. J.

Opinion and Order, February 7, 1963

[Doc. 173]

[CAPTION]

61 Civ. 2324

METZNER, District Judge.

Defendant Hughes Tool Company (Toolco) moves to dismiss the complaint pursuant to rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state any claim upon which relief can be granted. The original notice of motion was filed on August 9th, 1961 and in addition to the grounds now urged requested summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure. In effect, the present notice of motion brings on for hearing the original motion.

In its brief Toolco has stated,

"At the suggestion of the Court (Transcript of pre-trial conference of September 6, 1961, pp. 50, 52) Toolco agreed to postpone the motions and thereafter commenced its pre-trial examination of TWA."

The opinion of this court of January 19th, 1963 sets forth the numerous occasions on which counsel for Toolco agreed that the motion as originally filed was not ripe for determination. Consequently, it was not a suggestion of the court, to which Toolco courteously agreed, that the matter be postponed. Rather it was an understanding by counsel that under the decisions of this circuit summary judgment in this type of case should not be considered until the deposition proceedings are completed. (See also *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 [82 S.

Opinion and Order, February 7, 1963

Ct. 486, 7 L.Ed. 2d 458] (1962)). The grounds now urged under rule 12(b) existed and were adverted to in the original notice of motion. Since counsel for Toolco has indicated he was prepared at that time to argue the matter, he could just as well have submitted it then, instead of requesting on January 14th, 1963 that the motion now be heard, when the taking of the deposition of Howard R. Hughes is imminent. Furthermore, the Special Master on October 25th, 1962 granted the second adjournment of this deposition, from October 29th to February 11th, 1963, and stated that the long adjournment of more than three months was in order to allow Toolco's counsel sufficient time to make whatever motions he thought were necessary.

On January 14th, 1963, when Toolco moved that its motion to dismiss be set down for hearing, it also requested that TWA first proceed by written interrogatories directed to Hughes, instead of by oral deposition. This request was formally denied on January 19th, 1963, after a pretrial conference held on January 17th.

Counsel for Toolco continually relates the taking of the deposition to a determination of the motion to dismiss. As I have indicated before, this deposition depends not only on the existence of alleged valid claims against Toolco, but on Toolco's counterclaims for \$385,000,000 against plaintiff and the additional defendants.¹

¹ On the morning of the argument of this motion (February 6th, 1963) Toolco filed another notice of motion returnable February 8th, 1963 requesting that all further proceedings with respect to the counterclaims be stayed pending a disposition by the Civil Aeronautics Board of a "Complaint of Hughes Tool Company and Request for Investigation" which had been filed that day with the CAB. The only document attached to the notice of motion is a copy of the complaint filed with the CAB, seeking relief under sections 408, 409, 411 and 1002 of the Federal Aviation Act. That complaint names all of the additional defendants in the action pending in this court and also Pan American World Airways, Inc. and Juan T. Trippe. It

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So much for the underbrush. Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b)(6).

Briefly, the plaintiff, TWA, charges that Toolco, Hughes, and Holliday, named defendants, and Atlas Corporation have combined and conspired to restrain, and have attempted to monopolize, interstate and foreign commerce of the United States in the furnishing of jet aircraft and/or nonjet aircraft by sale, lease or other means, to TWA, and to TWA and other air carriers, in violation of sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act. It more specifically alleges that the defendants and Atlas combined to restrain commerce by providing financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco, and that they required TWA to boycott all suppliers of aircraft except Toolco, in violation of section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on the condition that the purchaser or lessee would not buy or lease the goods of a competitor of the vendor or lessor, in violation of section 3 of the Clayton Act. The complaint also charges that acquisitions of the stock of a corporation were made in violation of section 7 of the Clayton Act.

sets forth some of the allegations contained in the counterclaims and also makes reference to the proposed merger of TWA and Pan Am. It further alleges that Trippe, the dominant force in Pan Am, also has been in the position to influence the policies of Metropolitan Life Insurance Company, a large lender to TWA and one of the additional defendants in this action. Thus, the conspiracy alleged in the counterclaims has been enlarged by including Pan Am and Trippe. Jurisdiction of the CAB is predicated upon a claim that the decision in *Pan American World Airways, Inc. v. United States*, 31 U. S. L. Week 4124 (U. S. Jan. 14, 1963) (Nos. 23, 47) [371 U. S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325], grants the CAB primary jurisdiction.

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The first claim is concerned with acts allegedly committed during and prior to December 1960 which, it is claimed, violate all of the above mentioned statutes. The second claim deals with events occurring subsequent to December 1960 which are alleged to violate sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. For these claims, plaintiff seeks treble damages, divestiture, and an injunction. The third claim charges that the defendants have wilfully and maliciously damaged the business of TWA by the acts alleged in the prior claims, and seeks damages and an injunction under the common law.

Defendant Toolco urges that the complaint be dismissed because the control by Toolco over the plaintiff was authorized by the CAB and was thereby exempted from the anti-trust laws. The other ground urged is that the subject matter of the complaint is within the exclusive primary jurisdiction of the CAB.

Toolco indicates that it has withdrawn its motion for summary judgment. However, its brief relies on matter outside the complaint to justify dismissal on the ground that the acts done by Toolco were pursuant to the exercise of control over TWA authorized by the CAB and therefore exempt from the antitrust laws. Dismissal under rule 12(b)(6) is not warranted, though summary judgment might be available. *Putnam v. Air Transport Ass'n of America*, 112 F. Supp. 885 (S.D.N.Y. 1953). The defendant appears to be in a procedural dilemma. Since defendant has raised the issue of exemption in its third affirmative defense, the court will consider this branch of the motion as one for judgment on the pleadings pursuant to rule 12(c). Matters dehors the complaint may be considered on the branch of the motion seeking dismissal for lack of subject matter jurisdiction. *Cohen v. American Window*

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Glass Co., 126 F. 2d 111, 114 (2d Cir., 1942); *Central Mexico Light & Power Co. v. Munch*, 116 F. 2d 85 (2d Cir., 1940); *Moore v. Gorman*, 75 F. Supp. 453 (S.D.N.Y. 1948).

Toolco relies on the 1944 and 1950 orders of the CAB permitting Toolco to acquire control of TWA. 6 CAB 153; 12 CAB 192. These orders were issued pursuant to section 408(5) of the Civil Aeronautics Act of 1938,^{*} which makes it unlawful without CAB approval for "any person engaged in any other phase of aeronautics to acquire control of any air carrier in any manner whatsoever". Toolco was considered as one engaged in a phase of aeronautics because of its activities in the development of aircraft and accessories.

Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, provides that

"Any person affected by any order made under sections 408 [49 U.S.C. § 1378] * * * shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

It is Toolco's contention that all the acts complained of by TWA are immunized from claims of violations of the antitrust laws because of section 414. This leads to an examination of what action was approved by the orders issued pursuant to section 408(5) and what is the scope of the exemption provided by the words "insofar as may be

^{*} This section is now 49 U.S.C. § 1378(5). The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 et seq., superseded the Civil Aeronautics Act of 1938, 52 Stat. 973, making no changes relevant to the problem before the court.

Opinion and Order, February 7, 1963

necessary to enable such person to do anything authorized, approved, or required by such order", in section 414.

Statutory authority granted regulatory agencies to give exemption from the application of the antitrust laws is not unusual.³ But the Supreme Court has clearly stated that immunity from the antitrust laws is not to be lightly implied. *California v. Federal Power Comm'n*, 369 U. S. 482, 485 [82 S.Ct. 901, 8 L.Ed. 2d 54] (1962). Regulated Industries are not per se exempt from the antitrust laws. *United States v. Borden Co.*, 308 U.S. 188, 198-199 [60 S.Ct. 182, 84 L.Ed. 181]. And it is elementary that repeals by implication are not favored. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 [65 S. Ct. 716, 89 L.Ed. 1051] (1945). In the latest decision by the Supreme Court, *Pan American World Airways, Inc. v. United States*, *supra* note 1, which will be discussed in detail below, the Court stated that the regulatory scheme here in question would not be read as designed completely to displace the antitrust laws "absent an unequivocally declared congressional purpose so to do." 31 U.S.L. Week at 4126. [371 U. S. at 305, 83 S. Ct. at 482]. It went on to say that the antitrust problems "expressly entrusted to [the CAB] encompass only a fraction of the total." *Ibid*.

The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco.

³ See, e.g., 47 U.S.C. § 222(b) (1) (telegraph mergers approved by the Federal Communications Commission); 47 U.S.C. § 221(a) (telephone mergers approved by FCC); 46 U.S.C. § 814 (rate fixing and other agreements between water carriers approved by the Federal Maritime Board); 49 U.S.C. § 5 (railroad mergers approved by the Interstate Commerce Commission); 49 U.S.C. §§ 5a-b (agreements between carriers involving rates approved by ICC); 15 U.S.C. § 18 (exempting from the operation of section 7 of the Clayton Act transactions approved within their statutory authority by the CAB, FCC, Federal Power Commission, ICC, FMB, Secretary of Agriculture, and, in some cases, the Securities and Exchange Commission).

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The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414. *Cf. United States v. Southern Pac. Co.*, 290 Fed. 443 (D.Utah 1923). These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of “acquisition of control” not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.

I have found no case and none has been cited to me which interprets the words “necessary to enable such person to do anything authorized, approved, or required by such order”, or similar exemptive language in other statutes, in a way that will sustain Toolco’s position. In *Putnam v. Air Transport Ass’n of America*, *supra*, the plaintiff was attacking a claimed boycott by the defendants. The court in applying section 414 stated that the boycott was “the inevitable result” of the agreement sanctioned by the CAB which by its terms permitted the defendants to choose with whom they would deal. This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or attempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order.

One more point merits discussion under this branch of the motion. The second claim for relief is based on acts alleged to have been committed by the defendants and Atlas subsequent to December 1960. In December 1960 TWA

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moved before the CAB for modification of the original order of 1944 as amended. Approval was also sought

"under section 408 * * * for the transactions contemplated under the financing plan. Similarly sought is approval * * * under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock."

This relief was requested in connection with the jet aircraft financing transactions which resulted in Toolco's putting its 78% stock interest in TWA under a voting trust, which in effect gave control of TWA to the lenders who are named as additional defendants in this action.

On December 29th, 1960 the CAB entered its order on this motion (Order No. E-16195). In the course of the opinion, the CAB said at page 6:

"Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.

"In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA." It is clear that such approval would not be

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forthcoming without a searching inquiry into the public interest factors affecting this control.²⁰

Footnote 19 in the above quotation reads as follows:

"The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained."

It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960. Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim.

We come now to the question of "primary jurisdiction" which is defendant's second ground for dismissal of these claims. In discussing the primary jurisdiction of the CAB in relation to this complaint, there is some overlap with the discussion as to the effect of an order issued under section 408(5) and the extent of the exemption granted by section 414. In this case we are concerned primarily with whether there exists exclusive primary jurisdiction in the CAB without regard to whether or not it has taken any action in relation to a particular transaction. *Cf. Far East Conference v United States*, 342 U.S. 570 [72 S.Ct. 492, 96 L.Ed. 576] (1952).

Defendant places great reliance upon the recent decision of the Supreme Court in *Pan American World Airways*,

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Inc. v United States, supra, popularly known as the *Panagra* case. In determining the scope of this decision we must first go to the next to the last sentence of the majority opinion, which reads:

"We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." 31 U. S. L. Week. at 4129 [371 U.S. at 313, 83 S.Ct. at 486].

The Court was dealing with section 411 of the act, 49 U.S.C. § 1381, which gives the CAB jurisdiction over "unfair or deceptive practices" and "unfair methods of competition" by air carriers. The acts charged to be antitrust violations were limitations of routes, divisions of territories, and the relation of a common carrier to air carriers, which the Court stated were "precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 31 U. S. L. Week at 4126 [371 U.S. at 305, 83 S.Ct. at 482]. The Court went on to say:

"It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review * * *." 31 U. S. L. Week at 4127 [371 U.S. at 309, 83 S.Ct. at 484].

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If we substitute in this quotation the words "acquisition of control of any air carrier by any person engaged in any other phase of aeronautics" in place of "an affiliation between a common carrier and an air carrier", we have presented the fact situation upon which Toolco relies. However, the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor between this case and the *Panagra* case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest,⁴ they are not the type of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. Cf. *Georgia v Pennsylvania R. R.*, *supra*.

Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in the *Panagra* case to the effect that since the Board's essential regulatory powers deal with the division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here. 31 U. S. L. Week at 4128 n. 19. [371 U.S. at 313 n. 19, 83 S.Ct. at 486 n. 19].

It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. *River Plate & Brazil Conferences v Pressed Steel Car Co.*, 227 F.2d 60 (2d Cir., 1955);

⁴See CAB Order No. E-16195 quoted at page 13 [p. A125] *supra*. [214 F. Supp. at 110-11]

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Putnam v Air Transport Ass'n of America, supra. The cases of *American Airlines v Standard Air Lines*, 80 F. Supp. 135 (S.D.N.Y. 1948) and *United States v Railway Express Agency*, 89 F. Supp. 981 (D.Del. 1950), relied on by Toolco, are not in point.

In addition to the determination that as a matter of law the Board does not not have exclusive primary jurisdiction over the acts alleged in the complaint, the practical aspects of this case make especially apposite the statement in the *River Plate* case, *supra*, to the effect that a reference to the agency would be "useless and time-consuming" (227 F.2d at 63). Over 10,000 pages of testimony have already been taken by Toolco in deposition proceedings and over one and a quarter million documents have been produced in these proceedings by all parties. If there is any policy that would favor referral, it is not present in this case. See *Atlantic Coast Line R. R. v Riss & Co.*, [105 U.S. App. D.C. 380] 267 F.2d 657, 658 (D.C. Cir. 1958).

Consequently, the motion to dismiss is denied. The application made upon oral argument for a certificate pursuant to 28 U.S.C. § 1292(b) was denied at that time. Toolco's application for a stay of all deposition-discovery proceedings pending an application for a stay to the Court of Appeals was granted on the oral argument to the extent that all deposition-discovery proceedings are stayed until 5 p. m. February 8th, 1963 to allow Toolco time to request a stay from the Court of Appeals beyond that time.

So ordered.

Dated: New York, New York
February 7, 1963

[The above opinion also appears at 214 F. Supp. 106]

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The above opinion is filed pursuant to the order of the court entered on February 6th, 1963, which was endorsed on the back of the notice of motion dated January 14, 1963 and which reads as follows:

"Upon consideration of defendant's brief filed on 2/1/63 in support of the motion to dismiss, the answering brief of plaintiff filed on 2/2/63 in opposition, defendant's reply brief filed at noon today, and the oral argument on said motion, the motion to dismiss is denied. A formal opinion giving the reason of the court will follow. So ordered.

Feb. 6, 1963 at 6:05 p.m.

/s/ CHARLES M. METZNER
U. S. D. J.

**Toolco's Notice of Position,
dated February 8, 1963**

[Doc. 174]

[CAPTION]

61 Civ. 2324

NOTICE OF POSITION

SIRS:

PLEASE TAKE NOTICE that upon:

(1) the decision of this Court of February 6, 1963 denying Hughes Tool Company's ("Toolco") motion to dismiss the complaint;

(2) the decision of the Court of February 6, 1963 denying the application of Toolco for a determination which would permit a discretionary review at this time by the Court of Appeals pursuant to the provisions of Title 28, U. S. C. § 1292(b);

(3) the enormous expenses which would be incurred by Toolco directly, and indirectly as the 78% owner of plaintiff Trans World Airlines, Inc. ("TWA") in further pre-trial and trial proceedings and the belief of Toolco that such expenses would exceed the amount of damages provable by plaintiff under the complaint;

(4) the position of Toolco that it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants at this time; and

(5) all proceedings to date;

Toolco hereby elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the

Toolco's Notice of Position

burdens and expenses involved in further pre-trial and trial proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein.

Dated: New York, New York
February 8, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.

Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

To: CAHILL, GORDON, REINDEL & OHL
80 Pine Street
New York 5, New York

cc: Honorable J. Lee Rankin
Special Master
[All other Counsel]

Transcript of Pretrial Hearing, February 8, 1963

[Doc. 188]

[CAPTION]

61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.
New York, February 8, 1963, 5:00 p.m.

[APPEARANCES]

. . .

The Court: This hearing has been called at the request of Mr. Sonnett, I understand, based on Mr. Davis' communication with the Special Master, which is contained in a letter to me from Mr. Davis, stating that Toolco had elected to rest on the merits of its positions and decided not to proceed with the deposition in California. Attached to that letter is a notice of the position of the defendant Tool Company.

Mr. Sonnett, do you want to start off by telling the Court why you requested this conference?

Mr. Sonnett: Yes, your Honor. The difficulty I have had with the documents to which your Honor has referred is that I don't understand them, I don't know what they mean. I do not know whether this consists of a representation to the Court that Mr. Davis has been authorized by his client to apply for leave to withdraw his answer and consent to the entry of a default judgment for the relief requested in the complaint, in which event, if it were that, I would have a position to express; or I don't know whether on the other hand it means that they are just proposing to take no further action on behalf of the Tool Company in the case and that they will not be present accordingly for Mr. Hughes deposition on Monday; and since he has been noticed and is under subpoena to appear as a witness, I think

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if they do not appear on Monday I would regret not having the pleasure of their company but the attendance of the Hughes Tool Company at that deposition is not at all necessary of course. They can waive their right to cross examination of Mr. Hughes if they so elect.

Not knowing what this document means, and since we are all prepared to go, indeed, I have six or eight people out there—I have had for five or six days—and since Judge Hall would certainly want to know whether there is going to be any change in the date, and since I see no reason in these documents for any change in the date, unless the proposal is to enter a default judgment, it seemed to me desirable to try to clarify it by a hearing before your Honor today.

If it is an application for the withdrawal of the answer and for leave to have a default noted by the Tool Company, TWA would move for the entry of a default judgment for the relief in the complaint.

I would have an application by way of amendment on the prayer for damages because of their counterclaims, which allege that the damage to TWA was \$45 million, our complaint alleged we thought it was in excess of thirty-five. Our investigation to date satisfies us that the \$45 million damage figure is correct, so we would move for leave to amend the damage prayer and for a default judgment with the relief sought in the complaint, if in fact what they are proposing to your Honor is that their default in this case be noted.

If it is not that, I don't know what it is. That is my problem, your Honor.

The Court: Mr. Davis?

Mr. Davis: Your Honor, I think that it might be desirable for the record for me to particularly call to your attention a ruling of the Special Master in connection with

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this notice for the taking of the deposition of Mr. Hughes in California and my acceptance of the subpoena. It has a bearing on what I am about to say with respect to the decision of the Tool Company and their understanding of the consequences which have been explained to my client.

I am referring to page 99 of the transcript of a hearing before the Special Master on September 15, 1962. Since I don't know that your Honor has that before you, may I read it? It isn't very long.

The Special Master stated at that time:

"I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena, either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the the service of such subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding."

Before I go further, your Honor, may I say that the acceptance of the subpoena on behalf of Mr. Hughes was valid, never was questioned, and I also followed the directions of the Special Master.

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May I continue now?

"It is very difficult for me to try to do equity to all the parties in this proceeding. Everyone claims he wants to be first.

"I recognize what the Court has said about the validity of the subpoena in Los Angeles, or assert in any way, shape or form that he is not now personally subject to that subpoena, he must do so by a written communication to you.

"I ask that you include in that direction also a response to the question of documents, because it is also a subpoena duces tecum. I think we are entitled to have a report directly from Mr. Hughes to you on that subject, since there is nobody speaking for Mr. Hughes individually as counsel present."

And then he continued as follows:

"I will incorporate in my direction to counsel for the Hughes Tool Company"—

Now I am reading at page 181 of the same day, September 15, 1962, by the Special Master:

"I will incorporate in my direction to counsel for the Hughes Tool Company the order that if Mr. Hughes does not accept the interpretation I place upon the subpoena, and the authority for service of that subpoena, and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week.

"I am imposing that responsibility for giving that notice upon counsel for the Hughes Tool Company, because I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond

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to the subpoena because of any such claims, either as to personal appearance when the Court would order, or as to the production of documents."

I don't think that the balance is pertinent to the point that I am making.

The Hughes Tool Company is aware of those rulings of the Special Master, and the Tool Company did not seek a review of those rulings of the Special Master by the Court and accepted in effect the responsibility placed upon it by that ruling.

I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37(d)—Rule 37(d)—of the Federal Rules, with respect to the sanctions which could be applied by the Court on the Tool Company.

Now your Honor, following the decision of the Court of February 6th denying the motion to dismiss on the grounds there presented, and the further decision of the Court to deny the application of Tool Company for a determination which would have given the Tool Company an opportunity—so the Court of Appeals have granted the request—to obtain a review of those orders, the Tool Company concluded and advised me that, based upon the expenses which have occurred to date and which it believes it will incur, both directly and indirectly as a 78 per cent owner of TWA, those determinations by the Court amount, so far as they are concerned, to a very substantial money judgment, as a practical matter.

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They further stated, and advise me, that they do not believe that under the allegations of this complaint TWA would be likely to be able to prove damages by reason of this alleged course of conduct; that that would not be equal to—or, rather, put it the other way, that these expenses that they anticipate they believe would equal, if not exceed, what they believe are the maximum amount of damages that TWA would be able to prove.

Accordingly, I was instructed to take the position that I have indicated by this notice of position.

Now, if there is any question about the language that is to be used to effectuate what the determination by the Tool Company is, I am perfectly prepared to clarify it in any way possible.

There is only one thing I want to make perfectly clear on the record. The purpose of the position of the Tool Company, which it is taking, is to have an opportunity to obtain a review on the questions of law involved based upon the proceedings had to date; and, therefore, I have tried to prepare a piece of paper which would not preclude or prejudice the rights of the Tool Company to such an appellate review.

The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose upon the Tool Company; and if there is anything I can say that will further clarify what the effect is of the position which the Tool Company is taking, I am prepared to do so.

Now, obviously Mr. Sonnett, I am sure, is much more learned in these matters than I am, and he states the alternatives in a manner which of course I cannot accept, but there would be no point whatever in my taking the position which I am taking in behalf of the Tool Company if I did

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it in such a manner as to deprive my client of an opportunity to obtain a review; and therefore we do not consent in the sense of requesting the Court to strike our pleadings or take any other action, but we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages.

I don't know if there is anything else I can say that would help to clarify the situation. I tried to indicate as soon as I could, after the decision of the Court on February 6th. I called Mr. Rankin the next morning to advise him orally of the decision which had been made and I asked him to make that information available to the Court and to all counsel. I did ask him, however, to request counsel not to make any statements to the press with respect to that position until I was able to formulate it in words which would more or less satisfy me.

I may say, your Honor, that, working with Mrs. Lea and Mr. Cox, I had a great deal of difficulty in formulating anything that they would agree with. Apparently no matter how I tried to say it somebody was always thinking, well, if you said it this way this might happen or that might happen. At least I have been unable to find any particular precedent for something exactly like this.

The decision of the Supreme Court in the Procter & Gamble case was called to my attention, where there, of course, the government was the plaintiff, and they tried to expedite the reviewability of a determination by the Court requiring the government to produce documents by in effect inviting or suggesting to the Court an amendment to the order requiring the production to include a provision that,

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upon the failure to produce the documents, the complaint would be dismissed.

Apparently the question developed procedurally up until the time it got to the Supreme Court, which was whether or not the government was then precluded from objecting to the form of order or amendment that it had submitted to the court. The Supreme Court held for the government's position that they were merely taking a procedure to avoid, I believe the expression is, "an unseemly contempt."

Well, we are trying in a way to do the same thing, but obviously I am not requesting the Court to do anything. I am merely taking a legal position on behalf of my client so as to obtain, for the reasons stated in that notice, an order or determination which is either reviewable by its terms or which the Court may feel warrants a certification under 1192(b) [1292(b)] so as to give me an opportunity to obtain a review.

I don't know if there is anything else I can say by way of explanation, your Honor, in view of what has developed.

The Court: Well, it seems to me that even though the Court did not grant you a certificate under 1292(b) you could have applied to the Court of Appeals for mandamus and, in conjunction with that application, have requested the Court to grant you a stay. I would think that the review afforded you by mandamus would be the same review that the Court of Appeals would give to any certificate I might have issued under 1292(b), because the court does not automatically take the case on appeal until the court itself has agreed with the granting of the certificate by the District Court judge. But you have not done that.

Mr. Davis: Yes, your Honor, I gave very careful and deep consideration, to be sure, in a very short period of

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time, and that was my initial reaction, as your Honor well knows, when your Honor announced his decision on February 6th.

But I find myself confronted with this dilemma: the denial of my request for the statement in the opinion of the Court as to (a) the existence of the substantial question and (b) that the determination of that question would expedite the disposition of the action placed me in about as poor a position as I could conceive of to obtain a writ from the ground that they were unusual circumstances existing here which required resort to that extreme remedy.

In any event, within the time until today I did not think that I could prepare an adequate application which would give me any reasonable hope to expect the granting of a stay, and I so advised my client to that effect.

And therefore, with the very clear indications that your Honor was unwilling to consider any postponement of the date of February 11th, even assuming that I filed my writ, which would not become returnable until the next motion day of the court, which is next Monday, I concluded, I believe soundly—but I have been wrong certainly on a number of occasions—

The Court: So have I.

Mr. Davis: —here that I have no basis for a stay.

Now, if your Honor will recall—that is, I recall—when I sought to obtain a stay at a time when I thought I had some fairly persuasive grounds—that was in connection with the documents covered by the attorney-client privilege—I found that in order to even approach the Court of Appeals for a stay there would have to be some appeal pending before it.

I filed a notice of appeal, and at that time I had some authority to support my position, that the determination

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of the waiver of the attorney-client privilege was a legal determination of a collateral matter unrelated to the merits of the lawsuit, which therefore had that sense of finality to it under the doctrine, I believe, expressed by Mr. Justice Jackson.

My opponents made a motion to dismiss that appeal on the ground that it was not an appealable, reviewable order, and I tried to cover that position, but it was announced in the morning that they got a delay until later that day and indicated that they were going to bring on on that same day a motion to dismiss my notice of appeal. I tried to cover by a writ of prohibition and mandamus.

Then Judge Bromley, apparently knowing the procedure better than I did, took the position that apparently you have to obtain leave before you file a writ of prohibition and mandamus. Well, I have been through one of those before without obtaining any leave just by filing it to see what determination the court made.

In any event, the court on that occasion concluded that my notice of appeal was to be dismissed, considering the question non-reviewable, denied leave to file the writ of prohibition and, of course, denied the stay; but at that point there was nothing for them to stay to protect their jurisdiction.

So that so far as obtaining a stay of incurring the burden and expense of moving out to California and then undertaking what is their [sic] contemplated, I had to advise my client that I had no alternative; and then based upon, as I say, an estimate, an analysis of the amount of expenses that would be incurred, assuming that we continued with the trial on the merits, both in pretrial proceedings as contemplated and at the trial, together with the fact that we indirectly stand 78 per cent of the expenses that TWA is

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incurring, and based upon the fact that the Tool Company at least believes that, assuming for this purpose there is a violation of the antitrust laws and having controlled or dictated the type of equipment or financing that TWA entered into, the question is how was TWA injured—and after all, we were 78 per cent owner at the time, and I know that my friend Mr. Sonnett has some very interesting theories about how those damages built up, including the fact that we made money by one or two tax savings; but I don't follow that reasoning in the concept of damages that would result from these various allegations—in any event, rightly or wrongly, the Tool Company concluded that to stand the burden and expense that would be involved, being in the peculiar position of paying both the expenses of the plaintiff, or 78 per cent of them, and its own defense, the inability to obtain a review at this time is tantamount, as far as they were concerned, to a very substantial sum of money, and it is several million dollars, your Honor, that they concluded was involved, more than \$5 million, your Honor.

I resisted the figure that they came up with, and I am trying to get a further idea of how they arrived at that figure, but I have been assured, upon checking and double checking, that that is the minimum that would be involved, and before attempting to address itself as to the probable amount that TWA would be spending.

Under those circumstances, the Tool Company felt that, as a business decision, it would be preferable to stand on the validity or the merits of our positions to date, and to then obtain some form of reviewable order, depending, of course, on the type of determination that the Court may make by reason of the position being taken by the Hughes Tool Company.

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The Court: Do I understand your statement to the Court, which is not embraced within your notice of position, which is the only official document I have from you, your letter of transmittal—

Mr. Davis: I am sorry, I can't hear you, your Honor. I am very bad today.

The Court: Well, I will raise my voice, Mr. Davis.

The only document before the Court is the notice of position. Do I understand you to say that embraced within the contemplation of this notice of position is your informing the Court that Mr. Hughes will not appear for deposition on Monday, February 11th?

Mr. Davis: That is correct, your Honor.

The Court: And therefore the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37?

Mr. Davis: That is correct, your Honor.

The Court: What about the counterclaims?

Mr. Davis: On the counterclaims, your Honor, as your Honor will recall, I have a motion pending to stay—not to dismiss but to stay—those counterclaims until after a determination has been made by the CAB pursuant to a petition—application filed before the CAB, and your Honor will recall that you put over the hearing on that motion to February 18th at the request of Mr. Hupper.

Now, the position of the Tool Company with respect to these additional defendants is comparable, but let me make one thing clear for the record, your Honor, in case it may not be in the forefront of your mind.

The notice for the taking of depositions of the Tool Company, or of Mr. Hughes, was by TWA, it was not by the additional defendants.

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Now, it is true that your Honor did say in a prior order, when the Court set forth the order in which depositions would be taken, as you recall, that the Tool Company would have the right to continue and complete the taking of the depositions of those listed on the schedule limited to the issues of the complaint, to be followed by the depositions by TWA, in which the additional defendants could, if they so desired, participate, and then they would have the right to complete whatever depositions they were entitled to take on the counterclaims, and then, finally, the Tool Company could continue with such further deposition proceedings as it was then advised it could take.

As your Honor, I am sure, realizes even better than I do, my understanding of the decision of the Court of February 6th is that it recognized that the acquisition of control of an air carrier by someone engaged in a phase of aeronautics was clearly within the scope of Section 408 and the powers of the CAB to regulate.

The Court went on further and, as I understand the opinion, indicated its conclusion that that did not carry to the exercise of that control, or at least not to all phases of the exercise of that control.

My understanding of your Honor's decision is clearly that at least the acquisition of control under 408 is clearly within the competence of the CAB.

I respectfully submit further, and I believe I adverted to that on February 6th, whether or not a person is engaged in a phase of aeronautics, where the word of art is used under Section 408, is peculiarly within the expertise of the CAB.

Now, the counterclaims allege and depend upon a determination that these additional defendants are in fact engaged in a phase of aeronautics as the CAB finds it to be,

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and that their acquisition of control of TWA was a violation of 408.

I respectfully submit that in the Panagra decision they give us no choice, as we understand that decision, but to obtain a determination by CAB as to whether or not that conduct, that acquisition of control, was or was not something which they are prepared to find in the public interest and to which they are prepared to give exemption from the antitrust laws, because the very issue in Panagra was the contention that there had been conduct in violation of the antitrust laws prior to any approval by CAB. In fact, CAB, as in the Panagra decision, concluded that it did not have the power or the means to regulate the conduct there involved, and the majority concluded that the complaint was to be dismissed, or presumably, upon appropriate proceedings before the CAB; and should the CAB conclude that the conduct of Pan American and Grace was outside of the public interest or their willingness to approve it, then presumably a proper antitrust claim would then be assertable.

I also read the minority opinion and the two dissenters as not agreeing with the majority on the question of primary jurisdiction.

In any event, it is the position of the Tool Company that the counterclaims may not be effectively pursued at this time in this form, and the relief we are requesting in that regard, and which I was hoping to prepare myself to argue on February 18th, was to obtain from the Court an appropriate order which I believe is by leaving the matter docketed but staying all further proceedings therein until after the preliminary questions have been decided.

Your Honor will note that in the application to the CAB we are requesting expeditious treatment.

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The Court: I cannot follow you on your argument, Mr. Davis, in the first place, because I think it is clear that by virtue of my decision the CAB does not have exclusive primary jurisdiction in this matter.

Secondly, your first counterclaim is predicated on self-dealing between TWA and the additional defendants.

Your second counterclaim does state it is predicated on Section 408 of the Federal Aviation Act.

Your third counterclaim is the ordinary, simple derivative stockholders suit based on violations of the antitrust laws.

And the fourth counterclaim seems to be a claim for individual relief predicated on the activities set forth in the third counterclaim.

So I do not see how these counterclaims come within the jurisdiction of the CAB.

Mr. Davis: Your Honor, the thing that comes within the jurisdiction of the CAB is the legal effect of what the CAB presumably has the power to do, and that is to determine that to the acquisition of control, which is underlying the capability of obtaining any relief from the Court, confronted with the necessity of first having a preliminary determination by the CAB as to whether or not the acquisition of the control, which is what involves self-dealing, whether or not the violation of 408 and whether or not the alleged violation of the antitrust laws by the conduct that allegedly was engaged in, gives me, or whether or not the CAB, by finding, as they may find, that the acquisition of the control was within the public interest and grant them immunity under 414.

I read your Honor's decision—you are more of an expert than I am—to hold that there is no question about the exclusive, much less primary, jurisdiction of CAB to

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apply 408 with respect to the acquisition of control. Where I understand that we lost your Honor was in connection with the question as to whether or not the CAB had exclusive or primary jurisdiction to evaluate the conduct following the acquisition of control by reason of the manner in which the control was exercised.

The Court: Well, I disagree with your interpretation of my opinion. But let's get back to the third counterclaim, which is a simple derivative minority stockholders suit based on violations of the antitrust laws.

Mr. Davis: And if the CAB should determine, based upon this application now pending before it, that the acquisition of control by these additional defendants was in the public interest, they could grant them immunity from the antitrust laws under 414.

The Court: Well, are you saying you came into court a year ago to sue the additional defendants and now you say, well, now, why, we are suing the additional defendants here for a money judgment. Maybe you don't have jurisdiction, Mr. Southern District. We are going down to Washington to see if what we claim is wrong is really all right.

Mr. Davis: Your Honor, the situation at the time we filed these counterclaims was, and I believe a number of people believe, that the granting of exemption by the CAB could only apply when the CAB acted. And thereafter, it was my understanding, and I believe it was the understanding of a great many members of the bar more learned than I am in this field—I am talking now of the aviation field particularly—that prior to the Panagra decision the exemption from the antitrust laws was predicated upon affirmative action by the CAB.

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Now, there has been no affirmative action taken by the CAB with respect to the acquisition of control by these additional defendants. It was not until the Panagra decision came down that I was confronted with the fact that even though the CAB had not acted, and as the court, as I read the Supreme Court majority opinion, stated, it would be odd, I believe is the expression, that something which the CAB could find to be in the public interest and could grant exemption under the antitrust laws should run afoul of the antitrust laws and that the two systems collide, because what position can we be in if the conduct of the past can be, shall I say, blessed by the CAB? What kind of time, money and effort am I spending here trying to establish factually a violation of the antitrust laws if then the next day, or while I am doing this, the CAB, not necessarily at my instance but at the instance of the additional defendants, on its own motion should determine that the acquisition of control over this air carrier was in the public interest.

When the Panagra decision came down I found that the only alternative that I had, since I know how they would like to dispose of these kinds of claims, was for me to file an application with the CAB requesting them to take appropriate action, and I did that by a petition which annexes this very counterclaim, to explain to them, as I believe my petition does, that it was the belief of the Tool Company that it was necessary to obtain such a determination before we would be free to pursue our relief in the courts.

I also pointed out to your Honor that it would be impossible for me to take any other position and still maintain my position with respect to the complaint against the Tool Company. I wish to be sure that I lost before your Honor but I hope at some point I may have an opportunity

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to a review before an appellate court on that, and I certainly am not going to take any inconsistent positions.

Now, I respectfully submit to your Honor that the determination that was made by your Honor with respect to the both legs of the decision relating to our motion to dismiss the counterclaim—I am referring to our motion on the basis of approval in fact by the CAB, and then our basis of primary jurisdiction with respect to the conduct subsequent to approval—there is also inherent, as Mr. Hupper, I believe, was arguing on February 6th, that the nature of the conduct claimed, which we claim has been a violation of the antitrust law by these defendants, is not the same as the conduct which is claimed under the complaint even though they arise out of the same transaction.

In other words, this complaint and counterclaim all relate to the acquisition and financing of aircraft by TWA. On the one hand the TWA, under the present management, is claiming that the Tool Company, notwithstanding the fact that every transaction between the Tool Company and TWA was in fact approved, which they admit, by the CAB, nevertheless the manner in which we dictated the acquisition of their aircraft and financing precluded it being done some other way and was a violation of the antitrust laws.

We, on the other hand claim that these aircraft that were acquired and the manner in which they were financed were in fact dictated and controlled by these additional defendants, and ever since back in 1945, I believe, when the Equitable became the first senior lenders it was in a position to veto any financial transaction by TWA for any acquisition of aircraft.

But the conduct that is brought about is different. Whether or not the financing of any airline or the obtaining of equity money is monopolizing the market is a question,

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to be sure, but I don't see how the Tool Company can be expected to spend the time and money to prosecute these claims here if the CAB should turn around and say, oh, we think what these additional defendants have done is in the public interest, your Honor, and in your own opinion you quote in part, to be sure—not the part that we referred to in the 1960 order—

The Court: You look at footnote 20. I put it at footnote 19.

Mr. Davis: In mine it was 20.

The Court: Mine was 19.

Mr. Davis: Did it supersede 19?

The Court: No, I don't think so.

Mr. Davis: Well, in any event, your Honor, that is the position of the Tool Company with respect to these additional defendants. And, to be sure, after we have what I hope will be a fuller argument of the question on the 18th, your Honor may make some determination at that time with respect to how you want to dispose of these counterclaims.

But so far as this current February 11th date is concerned, the right of the additional defendants to participate in any depositions is dependent upon the right of TWA and based upon their notice, and I have indicated the Tool Company has taken an irrevocable position at this time which puts the plaintiff to whatever relief they are entitled to based upon that position.

Mr. Bromley: Your Honor, Mr. Davis has now told you twice, and I think he said this three times before, that my right to examine Toolco through Hughes is some way dependent on TWA's right, and he has told you four times that I have never served a notice to examine Toolco through Hughes.

You know, I think, full well, because I have said it many times, that it was nearly a year ago, to wit, on February

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13, 1962, that the clients represented by me, the additional defendants represented by me, served an appropriate notice under the appropriate rule to examine Toolco through Hughes, and we are entitled to have him there on Monday for that purpose, and unless Mr. Davis tells your Honor that he is now prepared to consent to a dismissal of his counterclaim with prejudice, then we are entitled to go ahead on Monday.

Of course, some of the other additional defendants served the same notice. Mr. Chanler's clients and Mr. Stewart's clients served the same notice. So I don't understand his constant repetition of a statement that Mr. Davis must know is not true, that is to say, that we have no independent right to examine Hughes, and he has not yet said whether Hughes is going to show up on Monday in response to that notice or not.

Mr. Davis: Your Honor, apparently Judge Bromley has misunderstood me or—

Mr. Bromley: I don't think I misunderstood you. You said it twice.

Mr. Davis: I never claimed that the additional defendants did not have an independent right to examine anyone they saw fit to examine. What I meant to say, if I did not say that that way, was that the notice for the taking of Mr. Hughes' deposition, which has been adjourned or put over until February 11th, and the subpoena, which I accepted on behalf of Mr. Hughes, relates to a notice for the taking of a deposition of Mr. Hughes, was served upon us or filed in California by TWA and not by the additional defendants. I was not intending to convey the impression that you are not in possession of some independent rights.

The Court: I have a distinct recollection—if I have a minute, I will find it—that in one of my pretrial orders I indicated that on the adjourned date, after TWA had finished

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its deposition proceedings of Mr. Hughes, the additional defendants would be entitled to proceed with their deposition. That is in an order of the Court.

Mr. Bromley: That's right. The occasion for that was an appeal from our notice, from the special master's decision with respect to our notice.

Mr. Davis: I believe, your Honor, that you may be referring to the March 8th order, because that is the one, I believe, that set out the order in which the various interests were to have the right to take depositions. I believe that is my recollection.

I don't have the March 8th order with me, your Honor, but if you have that before you you may find that that is what you have in mind.

The Court: I have it.

I am sorry, I can't find it offhand, but I have a distinct recollection.

Mr. Chanler: On January 10th, your Honor.

Mr. Bromley: Entered and filed March 6, 1962, your Honor.

The Court: Page 4?

Mr. Bromley: Page 4, yes, sir.

The Court:

"The defendant Hughes Tool Company may continue the deposition scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since the special master has been presiding over the depositions on a day-to-day basis, he will see to the application of this limitation, and upon completion of this phase of defendant's depositions the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. The additional defendants may participate in such depositions conducted

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by the plaintiff and in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions."

Mr. Bromley: That is what I referred to, yes, sir.

The Court: Do you wish to add anything else, Judge Bromley?

Mr. Bromley: Yes, sir.

I think it is important to call your attention to the fact that later on, in January, 1963, on page 3 of that order of your Honor's, at a pretrial hearing held on January 9th, you said:

"The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward."

The Court: That is not on page 3, is it, Judge Bromley?

Mr. Bromley: Page 3, the middle of that long paragraph, sir, beginning: "During the 10-month period the defendant has conducted over 80 days. . ."

The Court: Yes, I knew I had made some reference to it in the January 10th order.

Mr. Bromley: That is it.

So I intend to go to California tomorrow, and I would like the Special Master to be there Monday morning so that I may note an appropriate default under my notice, and I am sure—

Mr. Chanler: I join in that request.

Mr. Stewart: And I join in that request.

Mr. Harrell: Similarly on behalf of Mr. Tillinghast.

Mr. Sonnett: May I briefly advert to your Honor's question about the counterclaim, counterclaim 3.

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In all of the procedural maneuvering that appears to be going on I think it well to recall what your Honor said many months back, which was that the plaintiff should not be lost sight of in the maze of pleadings or the complexity of the pleadings that have resulted.

The TWA position is a very simple one. From the outset, and every time, in orders, notices, the subpoena that was issued by the court in California, the forged authorization, the ratification, the representations made by Mr. Davis to the Court there and here, it was represented that Mr. Howard R. Hughes, as a witness, was subject to the jurisdiction of that court for his deposition to be taken for use in this proceeding on behalf of TWA.

TWA's right to depose him, both on the complaint and answer, since the complaint still stands denied, and on the counterclaims, we think, is perfectly clear. Indeed, it has been ordered repeatedly by this Court.

I am not aware that there was any counsel in this room representing Howard R. Hughes, and TWA has not taken the position and will reserve the question of whether the Hughes Tool Company can or cannot produce Mr. Howard R. Hughes, and we are not particularly concerned because that is why we used the witness subpoena in the first place, to be sure he would be there.

The Tool Company asserted a counterclaim, among others, for \$45 million. Its counterclaim 3 purports to be on behalf of TWA and its 13,000 stockholders, and another 5,000 stockholders in Street names, so it purported to assert a cause of action for \$45 million on behalf of TWA.

It also asserted a cause of action in its own right against TWA, among others, for \$45 million.

I think it must be borne in mind, your Honor, that the Tool Company and these other defendants, including Holliday—who, by the way, is not a party, apparently, to any of

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these proceedings—it is he who is a defendant and he should be participating—I think it would be well to recall that these defendants controlled the operations of TWA in all respects, and they knew everything that happened and why it happened, who did it and how much it cost and what the results were.

When they see fit to represent to this Court, as they have in the counterclaim, that TWA was injured to the tune of \$45 million, I am happy to report to this Court that their estimate, based on the hard work that we have done since this case was filed, involving the use of Coverdale & Colpitts as experts, leads us to believe that, without touching any tax benefits that they derived by reason of their violation of law—before reaching that—TWA's damages are \$45 million-plus.

For Mr. Davis to stand here and with tongue in cheek say to this Court that the expenses of this litigation and of these depositions are so great—even, by the way, if they flew to California on TWA they would get 78 per cent of the profits of the flight—that the expenses are so great that they won't participate in discovery proceedings is obviously absurd.

I deny that Mr. Davis has any authority to state to your Honor definitively or otherwise what Hughes will or will not do on Monday morning. I don't think he can commit that man to his behavior at all.

He can say to you, if he is authorized to say it, that the Tool Company won't be there, but on behalf of TWA I say to your Honor that is completely immaterial.

I think this kind of strategy such as has been tried in the past, as I understand it what they are trying to do is to create some record so that a default in appearance Monday by Hughes is a default by the Hughes Tool Company, and therefore they would insist that TWA then make a motion

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under Rule 37(d), and it requires a motion, and we haven't made it and I am not sure we will ever make it, but it does require a motion, to ask your Honor to then enter a default judgment based on what? Based on their inability to produce him? I don't intend to proceed that way at all. I see no reason for changing the rules of practice at the behest of any individual.

We have, I submit to your Honor, TWA has, a right under your orders, under the processes of this court and the processes of the court in California, to the sworn evidence of this man.

Now, if there is any reason he cannot appear, let him say so. But we have a right to that evidence.

Who knows, if he is persuasive enough, he might persuade me that there is something in his derivative counterclaim. Up to date I haven't seen that to be true, but he might. And I have got a right to examine him.

In so far as the other counterclaims are concerned, certainly TWA has a right to defend itself against claims for millions of dollars by the Hughes Tool Company arising or said to arise out of the action in the counterclaims.

I think that the attempt to evade the question of the merits of this case by such procedural gimmicks as this is all too transparent. They cannot declare an anticipatory default. There is nothing in the rule that says that. If he wants to default, withdraw his answer and let's have a default judgment. If he doesn't, let him default on Monday if he has an application to produce Hughes on Monday.

So far as TWA is concerned, the obligation on Monday is for Hughes to appear personally, and we will take whatever action is necessary to see that he does, if he doesn't appear.

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This is, as TWA sees it, another stall or attempted stall. It is an attempt to bait us away from getting at the merits of the controversy by offering us some phony maneuver for a partial default judgment, unlimited damages. The damages I think we will collect in this case are \$135 million. That is the amount that they alleged we were hurt, tripled, and we will prove it.

We will also establish our right to the divestiture that we seek in this complaint.

These sorts of maneuvers do not reach that point at all. They will try to foreclose us from the sort of record that I want to present to your Honor, whether it is on default or trial, so that you will conclude, as I have, that the only proper remedy for the violations of law here, in addition to damages, is a divestiture of this stock. That is the only cure for this situation.

This is an effort to lead us down a garden path to some very unsatisfactory results. I think we should go forward on Monday.

The Court: Mr. Davis, have you or Hughes Tool Company directed Mr. Howard Hughes not to appear on Monday?

Mr. Davis: No, your Honor, I am not aware of any direction, certainly none that was emanating from me.

The Court: Suppose Mr. Hughes shows up on Monday.

Mr. Davis: Well, I am perfectly prepared to stipulate that the place of the deposition be here rather than in California and to make this the place, and we will note the default of his appearance. There is no question about that determination.

I do know that Mr. Hughes, by reason of the direction of the Special Master, has been informed of what I read to your Honor earlier.

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Your Honor, before I proceed to further answer your question, may I correct Mr. Sonnett, which I am sure he has said inadvertently because the notice for the taking of deposition which we are talking about of September 6, 1962, reads—this was addressed to the Special Master and that is what was granted and affirmed by your Honor—

The Court: What date are you referring to?

Mr. Davis: The notice of motion of TWA dated September 6, 1962, which is the subject of this discussion, by Cahill, Gordon, Reindel & Ohl. Let me read it:

"Please take notice that upon the pleadings here, and all prior proceedings herein, including the pre-trial hearing held September 6, 1962, before the Hon. Charles M. Metzner, United States District Judge, the undersigned will move before the Hon. J. Lee Rankin, Special Master, on the 11th day of September 1962 at 10:00 A.M. or as soon thereafter as counsel can be heard,

"(a) For an order that plaintiff Trans World Airlines, Inc. may commence the taking of the deposition of Howard R. Hughes at the United States Courthouse, Foley Square, New York, on September 24, 1962, and continue such deposition from day to day until completed,

"(b) For an order directing that defendant Hughes Tool Company produce said Howard R. Hughes at the time and place aforesaid for the purpose of such deposition. . ."

Now, I do not understand Mr. Sonnett's statement that what we are talking about is what he has been describing.

Mr. Sonnett: Reread paragraph (a).

Mr. Davis: I understand that, and that was changed from New York to California, and that is when I took the trouble of going out because I thought you were then taking

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the position that a notice of subpoena could not be served in New York and you were refusing to serve it in New York.

The point I am making is that you did take the position that it was the responsibility of the Tool Company to produce Mr. Hughes, and the Tool Company has taken the position that it has taken.

I am perfectly prepared to have a proceeding, if it will help your record, Mr. Sonnett, on Monday, if that is the date that you want. We can do it in this courtroom, you can do it in my office, you can do it in Mr. Rankin's office, and there you can note the fact that the Tool Company is failing in refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it.

I do not understand what remedy it is that the TWA is seeking when it has the opportunity to prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.

My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages.

Mr. Sonnett: May I briefly respond, your Honor, because I think—although again I have trouble understanding, Mr. Davis can talk so much and say so little—I think that he said to your Honor that he accepted the subpoena which was issued out of the Los Angeles court for the production of Hughes as an individual. I think he has admitted that he filed papers with the marshal out there, saying he was authorized to accept the service of the subpoena on behalf of Howard R. Hughes as an individual. I think he

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admits that he made that representation to this Court when we were dealing with the forged authorization matter and in an effort to blunt it, and I don't know yet whether Mr. Hughes has seen fit to issue instructions to this board of directors of the tool company or whether he hasn't about this matter. There is no counsel here speaking for him, and I haven't any illusions personally that anything Mr. Davis says is going to produce Mr. Hughes anywhere at any time unless Mr. Hughes decides to comply with the process of the court, and he is under that process.

This is only an attempt to create another procedural diversion. If there is going to be a default on Monday, let there be a default, that is within their power, it is within Mr. Hughes' power—but I know of no procedure for anticipatory defaults—otherwise let him withdraw his answer and let's have a judgment on the complaint for the relief we seek.

The Court: Well, I understand one of the reasons we are having this conference is to discuss an anticipatory default so that people don't go to a great deal of trouble and effort running out to California and coming back the same day.

Mr. Sonnett: I have people out there who have been there for six or seven days, about six people in an office, ready to go.

The Court: And there are a lot of people who are not out there, and I have been given to understand that this conference was called for the purpose of discussing this anticipatory default and to notice Judge Hall that he should discontinue any arrangement efforts he is making for this deposition to take place. It was done on the basis of Mr. Hughes not going to appear. Let us not have everybody running out there.

Now, Mr. Davis says that as far as the defendant Hughes Tool Company is concerned, they will admit today that Mr.

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Hughes will not appear on Monday and that as a result you may then take whatever steps you wish to pursuant to Rule 37.

I would also like Mr. Davis to state for the record that if by chance Mr. Hughes should appear at the courthouse on Monday, despite what has transpired here this afternoon, that that will be no defense to any proceeding taken by TWA.

Mr. Davis: I will so state, your Honor.

Mr. Sonnett: We are going to have people there in any event, your Honor, with respect to whatever you direct, and I mean that only in this sense, that I don't think Mr. Davis can call the turn on Mr. Hughes' movements any more than I can. There is process outstanding from that court, the courthouse is arranged, the amplifiers are in, the place is swept. We had a report this afternoon there are people out there with files all ready to go.

I think he either will show up or not show up. It is that simple.

The Court: Mr. Davis is telling you he is not going to show up, and Mr. Davis has been the conduit through whom the orders of the Court have been transported to Mr. Hughes, and one of those orders was that if Mr. Hughes did not show up the Court would entertain a motion for a default judgment and an assessment of damages.

If Mr. Davis now tells you that Mr. Hughes is not going to show up, and even if he is going to show up he is not going to use it as a defense to any motion in this court pursuant to Rule 37, I would think that takes care of that phase of the case.

I am bothered about the counterclaims.

Mr. Bromley: So am I.

The Court: I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made

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here this afternoon, and you may then move for your default judgment.

But the counterclaim problem bothers me, and I do not see, Mr. Davis, how you can do anything else but take a dismissal with prejudice on your counterclaims, otherwise the additional defendants are perfectly justified in going out to California and noting the default of Mr. Hughes and coming back and moving for a dismissal with prejudice.

Mr. Davis: Well, as your Honor undoubtedly recalls, there is already a motion pending by these additional defendants to dismiss these counterclaims with prejudice returnable February 18th.

The Court: That is on a different basis.

Mr. Davis: I understand that.

The Court: That is just another reason why—

Mr. Davis: I am perfectly prepared to state, if that will facilitate the procedural matters, that the Tool Company, in so far as these counterclaims are concerned, does not intend to pursue litigating those counterclaims in this court until after there has been a determination by the CAB, and if that has been—

The Court: You don't have any control of that. Once you instituted your action—and you are in the position of a plaintiff in that regard—the defendants acquired priority of deposition. You cannot come in now and say, "I am not going to push this; I am going to sit back and wait a while, and you, Mr. Defendant, have to wait for me."

Once you initiated that proceeding by way of counterclaim and the defendants have their right to proceed, you cannot tell them to stop.

Mr. Davis: Your Honor, I can only take a position I do not consent to any order that the Court may issue at the instance of these additional defendants for whatever reason they advance.

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I believe that I have called to your Honor's attention all that occurs to me at the moment which should be called to your attention, and you can be certain that I haven't had very much time to prepare on this, although in my conversation with Mr. Rankin yesterday it was not clear to me just exactly what would be involved here, except that the question of whether or not he were to go to Los Angeles was involved, and there is no question he called to my attention—

The Court: He may want to take a flight out there to note a default. I don't know.

Mr. Davis: I would be perfectly happy to do the same thing with respect to the additional defendants if your Honor rules that under the prior orders of the Court, notwithstanding my different construction of them, they are entitled independently of TWA to commence taking depositions on February 11th.

All I can do is say those will be the orders of the Court; and if they, like, Mr. Sonnett, would like to have a notation on the record of the position of the Tool Company and the failure of Mr. Hughes to appear, they can have that also, and then they can make whatever application they want which will produce whatever order the Court will grant them.

The Court: Judge Bromley, Mr. Davis has now said—and I call upon you simply because you appear first in the list of additional defendants as I recall them; I meant no offense to your colleagues—

Mr. Bromley: You did not do it on account of my age either.

The Court: Oh, never. Some day the same thing may happen to me.

You have heard Mr. Davis' suggestion, and if I can reiterate it, there is no necessity of your going out to

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Los Angeles to note Mr. Hughes' default—or, rather, to take Mr. Hughes deposition because he is not going to show up; that if he does show up and you are not there, this is no defense by them to any motion by you for a dismissal with prejudice of the counterclaims.

Since essentially this is a Hughes Tool Company matter, a dismissal with prejudice of the counterclaims, I would think, sufficiently protects the additional defendants, and if I am wrong on that I would like to know.

Mr. Bromley: First I would like to be made clear that this failure to appear, this declaration of refusal to appear, is a refusal to appear pursuant to the notices of the additional defendants of on or about February 13, 1962, to examine the Toolco by Hughes, and is a failure to appear with respect to the subsequent orders issued by your Honor with respect to those notices.

He has not made that clear.

The Court: Do you understand that, Mr. Davis?

Mr. Davis: Your Honor, I will answer it very briefly. It is a position based upon all proceedings to date. That includes all the notices that were served from time to time, all the determinations and decisions by the Court, and all the positions that the Tool Company has taken, so that it is based upon everything that has occurred to date, including the positions I have taken today.

The Court: Well, now they get a little complicated, because Judge Bromley says the prior proceedings of the Court and the notices are one way and you have argued the opposite way today.

Mr. Bromley: That's right.

The Court: So we are not clear.

Mr. Davis: All I meant by that, your Honor, was that up to this noting of default they want to make an application to your Honor as to whether or not they are entitled

Transcript of Pretrial Hearing, February 8, 1963

to whatever relief they seek, and I suppose at that time I will make perhaps no better an argument than I made today with respect to what their rights were under whatever has occurred, and if your Honor rules at that time—unless you want to make a ruling now, then that will be the ruling now and whatever record I have will be whatever has been decided.

The Court: Well, I purposely put over the motion, your motion, as served on Wednesday, returnable today, to stay all proceedings on the counterclaims pending a determination by the CAB on the ground that the issue of appearance or non-appearance was involved in your main motion to dismiss the claims, and that if the Court of Appeals were to grant a stay of my order, that it would be stayed for all purposes.

And I think I stated on the record, did I not, Mr. Hupper, that this is an extension of the stay to the claim extended to the additional defendants?

Mr. Hupper: Your Honor, I was so rash as to raise the subject and you hit me right over the head.

The Court: Well, you are an advocate and you are entitled to that.

Mr. Davis has not seen fit to apply for a stay and therefore the proceedings are to go forward.

Now Mr. Davis says, "Well, there is no point of going out to California on the claim because Mr. Hughes is not going to show up."

We might as well then consider the motion at this time for a stay of the proceedings on the counterclaims and deny that stay, and from then on we come to the question of what is the state of the record, come Monday, if Mr. Hughes does not appear; and, as I understand it, even if he does appear, it will make no difference.

Mr. Davis: That's correct, your Honor.

Transcript of Pretrial Hearing, February 8, 1968

The Court: Because if he appears, as far as the Hughes Tool Company is concerned, he has not appeared and they will not use his appearance as any defense to a motion made by the additional defendants for a judgment of dismissal with prejudice.

I want to point out to you, Mr. Davis, that Mr. Hughes' appearance on February 11th was not solely in conjunction with the deposition to be conducted by TWA but was also in conjunction with the counterclaims which you have asserted against TWA and the additional defendants; that notices to take that deposition were properly served; that the Court fixed an order of priority of deposition and indicated when the deposition of Mr. Hughes would go forward in so far as the additional defendants were concerned, and that was reiterated in the pretrial order of this Court on January 10th. So that if Mr. Hughes is not appearing—and even if he does appear, as far as we are concerned in this litigation, he has not appeared, on your concession—then the appearance is in default and in violation of the notices and the prior orders of this Court.

Judge Bromley, you may proceed on February 11, if you wish to wait until that time—and it is too late for you to make the application tonight—for a judgment of dismissal of the counterclaims with prejudice.

Is there anything else left on that?

Mr. Bromley: Only one more thing before I forget it.

Your Honor's stay of the tax documents having expired an hour and 25 minutes ago—

The Court: That is a third ground.

Mr. Bromley: A third ground—I ask for their production to the special master, who is here in the courtroom.

Where are the documents, Mr. Davis?

Transcript of Pretrial Hearing, February 8, 1963

The Court: You might as well make your record, Mr. Davis.

Mr. Davis: I restate my position, Mr. Bromley.

The Court: You are not producing the tax documents?

Mr. Davis: That is correct, your Honor.

The Court: We can consider those in the same category or you embrace them within your refusal of not going forward with any further deposition discovery proceedings?

Mr. Davis: That is correct, your Honor.

The Court: So there is outstanding therefore the default of Mr. Hughes on Monday, the failure to produce the tax documents, and the failure to produce the documents which you claim are governed by the attorney-client privilege and as to which the Court says the privilege has been waived.

I think on the latter you have a motion returnable February 18th.

Mr. Bromley: Yes, your Honor, which was intended to embrace all of these defaults which I thought he would make.

The Court: Do you wish to adjourn the motion now returnable on February 18th, or some more convenient time, at which time all of these things could be brought up? In other words, Judge Bromley, this is being done piecemeal. The record is now set for you to take whatever action you wish to take on the counterclaims and for Mr. Sonnett to take whatever action he wishes to take on the claims based on the default of Mr. Hughes on Monday.

Secondly, you have the failure to produce the tax documents, which is an individual and separate ground for proceeding; and you have the failure to produce the attor-

Transcript of Pretrial Hearing, February 8, 1963

ney-client documents, which are a separate and individual ground for proceeding.

However, only one of those has been noticed to the Court, and that was your notice for February 18th. My only question is shall we now on the record adjourn that motion without date so that all of your proceedings can come on at one time?

Mr. Bromley: Yes, I am ready now or at any time you say. I am willing to put it over as you suggest.

The Court: I will leave it up to you to renote the motion.

Mr. Bromley: That's right. I will accept that responsibility and do so.

Mr. Davis: Your Honor, will the special master undertake to advise the court in California, Judge Hall, of the result of today's proceedings?

The Court: Will you do that, Mr. Rankin?

Mr. Rankin: Yes, your Honor.

Mr. Sonnett: On that point, your Honor, is the record clear, as I think it is, but I want to be doubly sure, that there is no stay with respect to TWA's deposition of Mr. Hughes on Monday in California?

The Court: No. I am afraid, Mr. Sonnett, that we have agreed here—at least I think we have—that there is no point in your going out to California on Monday because Mr. Hughes is not going to appear, and that Toolco says that since he is not going to appear, and if he does appear in order to protect what he may feel are individual problems regarding failure to appear, you are still free to make application under Rule 37 for a dismissal or for a judgment on your complaint.

Pretrial Hearing, February 8, 1963

Mr. Sonnett: I am sure that binds Toolco but it doesn't bind Mr. Hughes.

The Court: Suppose that is so. That is the only part you have in the lawsuit right now.

Mr. Sonnett: So that therefore your Honor's direction today is without prejudice to whatever rights TWA may have to enforce the subpoena in California directed to Mr. Hughes.

The Court: What do you mean by that?

Mr. Sonnett: Well, we may see fit to seek some way of attempting to induce Mr. Hughes to appear and testify.

The Court: I see no reason for that at the present time.

Mr. Sonnett: At the present time I can't see anything very clearly except to be sure I can't see Monday very clearly.

The Court: Well, if you feel that as far as you are concerned, TWA, I will continue the stay of the deposition for that purpose only. If you want to have it lifted at some time in the future you may come in and apply to have it lifted solely for that purpose and none other. In other words, the understanding of the Court is that you have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February 11th, on consent of Hughes Tool Company, the only defendant here with the responsibility, I assume, to answer in mondy [sic] damages to your claim. And then you are free to move for a dismissal—I mean for a judgment on your claim.

Mr. Sonnett: If Mr. Davis accepts what your Honor has just said, I have no problem about Monday. I wish he would say yes or no to that.

The Court: Do you understand what I just said, Mr. Davis?

Pretrial Hearing, February 8, 1963

Mr. Davis: I understood what you said, your Honor, a long time ago, and I thought I made myself quite clear on the record, and I don't understand how Mr. Sonnett wants to take testimony—

The Court: Now, Mr. Davis, we have a simple question, yes or no?

Mr. Davis: I understand everything you said, your Honor.

The Court: And the answer is yes?

Mr. Davis: That's correct, your Honor.

Mr. Sonnett: Thank you.

The Court: All right.

(Adjourned sine die.)

Transcript of Pretrial Hearing, May 2, 1963

[Doc. 204]

The Court: At the time of the last conference in this matter, which was held on February 21, the Court suggested to counsel that perhaps they could get together on a judgment that would be appealable without the necessity of time-consuming hearings, which would only add to the enormous expense already incurred by the parties to this litigation. It was the hope of the Court that this would expedite the final disposition of the issues involved here.

About the 1st of March I was informed that the parties were unable to agree upon a form of judgment. Consequently, the whole matter is still open for adjudication.

I think that counsel are entitled to an explanation of the delay in disposing of this matter. As you are well aware, the Court was engaged in a criminal trial that commenced on December 7 and was finally concluded with a jury's verdict the day before yesterday, after five months of trial. Despite this long courtroom engagement, the Court has endeavored to stay abreast of the cases, such as this, that have been assigned to it for all purposes pursuant to Rule 2.

In the instant case we have had seven pretrial conferences during January and February, which Mr. Sonnett, I think, called the night court proceedings in TWA against Howard Hughes. Of course, during that time there were a number of opinions and memoranda and pretrial orders that had to be gotten out at night and weekends. In addition, during that same period I had the Alexander against Korvette antitrust suit in which there were a number of conferences from five till ten o'clock at night. Luckily, that ended in a settlement last week, which I don't suppose is possible in this lawsuit. And I had the minority stockholders suit against General Motors and duPont, in which two opinions have been handed down during the same period.

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So this is the first chance I have had to come back to this litigation.

Mr. Davis, I have read your brief very carefully. The great problem I have with it, is I don't think it comes to grips with the point which is so evident here. I intend to hand down a formal opinion in which I will state that there is a finding of a deliberate and wilful default in this case, and predicated upon that fact I can't quite follow the arguments that you are making in your briefs. So I want to call upon you first to say anything in clarification of your position.

Mr. Davis: I will be glad to, your Honor. I am prepared to proceed on that assumption, and the question now is what findings of fact and conclusions of law may the Court properly make which will put the case in a posture for a determination of damages, if any can be proven, by reason of the findings of fact and conclusions of law which the Court makes.

Now, so far as the conclusion of law is concerned, we have the prior decisions of the Court which unquestionably held that under this complaint as framed a plaintiff could prove a state of facts which would constitute a violation of antitrust laws outside the scope of the Federal Aviation Act. Now, the question is based upon the entire record, because I think it is easily established that under the decisions that whatever sanctions are to be applied under 37 and the kind of default which permits the Court to find an admission of any kind—

The Court: I don't think there is any question of admission here. You didn't admit anything. You wilfully defaulted under 37(b)(2)(iii). I am going to direct a default judgment.

Mr. Davis: I understand that.

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The Court: The facts of the complaint are admitted, not in the sense of an admission saying, "Yes, I did it," but they are true, and the only thing left is how much.

Mr. Davis: Whether or not you go to the extreme position under 37(d), rather than 37(b)(2)(iii), which relates to the production of documents, I believe, anyway, I have been thinking in terms of 37(d) rather than 37(b)(2)(iii) which basically are the same effect.

The Court: The words are the same, judgment by default against that party.

Mr. Davis: Now, the question is, your Honor, what findings of fact and conclusions of law can be made under this record as it exists. You cannot ignore the admissions of the plaintiff that exist on the record.

The Court: I don't think we reach that point. The plaintiff has been prevented from proceeding because you have failed deliberately to produce the one person whom they needed to adequately proceed on their lawsuit.

Mr. Davis: So they claim. Taking that claim, now, the question is what damages can be established based upon what conduct. Certainly, the plaintiff can establish what his case is without the necessity of Mr. Hughes to some extent. Certainly, he can prove the commerce that presumably has been affected. Certainly, the plaintiff can say what has happened to him.

All I am saying is that admittedly the plaintiff now is to be given an opportunity, and to the extent that he can show, "I would be able to prove this; this is my testimony. It is not complete because. . . ." And the Court has said that is so. So we will assume and admit that had he had Mr. Hughes, Mr. Hughes would have admitted all the things he tries to prove. You can't go beyond that. I heard Judge Bromley yesterday say if they had Mr. Hughes he could

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prove that he fired Mr. Thomas. Mr. Thomas is available. We are not to be punished. If the plaintiff wants to rest upon the record today, fine; there is nothing I can do about it. But if he wants an opportunity to establish what we did, after all, damages could be established with respect to what? Not a conclusion of law. The damages that the plaintiff is entitled to have to be related somehow or other to something that the Tool Company did.

Now, whatever Mr. Hughes' intentions were, still the plaintiff has to say this is what we did to TWA and "We want damages." And the question is what did we do which is a violation of the antitrust laws. I don't see how we can avoid that no matter how we approach it.

The effort that we tried to make in our brief was to point out, and that is where the time that we needed that was consumed, was in establishing what was established by the pleadings and the testimony to date on the assumption, the very assumption that your Honor postulated a moment ago, that all our denials were to be deemed stricken, and assuming that was the proper and fair relief to which the plaintiff was entitled to as a result of what has taken place today, admittedly, it is a matter within the discretion of the Court.

We call the attention of the Court to what cases we are able to find that even for that purpose there ought to be a hearing, not merely the ipse dixit is sufficient, but whether there is evidence to establish what it is that they have been deprived of proving by reason of the position taken by the Tool Company.

The Court: Mr. Davis, you were abundantly clear here on February 8th after I had waited for the time to expire for your application for a stay in the Court of Appeals. I think on February 6th I gave until February 8th at five

Transcript of Pretrial Hearing, May 2, 1963

o'clock to apply for a stay in the Court of Appeals. You didn't do it, for whatever reason involved is immaterial. But you didn't do it and you stated to this Court that you would deliberately not produce Mr. Hughes or that he would not appear and this was the result of a business judgment.

Mr. Davis: That is correct, your Honor.

The Court: And you advised your client, you said, of all the sanctions that could be imposed for this deliberate flouting of the order of this Court.

Now, with that record the only thing left is to find out how much you owe the plaintiff and to strike your counterclaim. You cited some cases here which just are not in point, one in this Circuit, *Gill v. Stolow*, 240 F. 2d 669, an opinion given in 1957, and in the very last part of the second sentence, which you have quoted here, there is this language, "... and general principles cannot justify the denial of a party's fair day in court except upon a serious showing of wilful default."

I think this record is clear that this is a wilful, deliberate default, and you said you take it after advising your client. You say it is a result of a business judgment arrived at by your client. And you say you are doing this because you want to quickly review the correctness of my opinion denying your motion to dismiss the complaint.

Secondly, in the case of *Bernat v. Pennsylvania Railroad* they say, "In a case where the refusal to produce a document makes it impossible for the plaintiff to prepare or present his case, a default judgment would be the proper remedy." In that case the statement given by a plaintiff to an insurance company investigating an accident is not comparable to the production of Mr. Hughes in this case, who, I think, is the motivating factor of everything that

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went on during the times alleged in the complaint. So I am completely unpersuaded. I see no reason to continue the hearing, Mr. Davis, unless there is anything more you have to say that is embraced in this document you handed me after six weeks of effort.

I will direct that a default judgment be entered, that the matter be referred to the Special Master forthwith for a hearing on the amount of damages. You can arrange with the Special Master for the dates to proceed with that. I will retain the jurisdiction and determination of the issue of the divestiture. The counterclaims will be stricken and judgment entered for the additional defendants, and I will enter a formal opinion tomorrow to that effect.

Mr. Sonnett: Would your Honor include TWA in the disposition of the counterclaims with prejudice since TWA also joined in the motion to dismiss those counterclaims?

The Court: I will do so.

Mr. Davis: Your Honor, excepting to your Honor's decision, may I inquire if there is a possibility that your Honor will contemplate the entry of a judgment in which your Honor will be referring the matter to the Special Master for the determination of damages which your Honor would be prepared to certify for purposes of a discretionary review by the Court of Appeals.

The Court: If that will expedite the determination of the issue I will do so. However, I will think about it overnight.

As I understand your point here, you will pay TWA all the money they are entitled to if it is determined that I do have, and when I say "T", I mean the Federal Court for the Southern District of New York, jurisdiction over this case?

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Mr. Davis: At this point, your Honor, the question is whether we are prepared to pay TWA whatever we owe TWA, if anything, based upon whatever conduct the Court has found by reason of everything that has happened to date which your Honor is prepared to hold constitutes in a defined or undefined way a violation of the antitrust laws. That would permit us, I think, to achieve at least the other objective that we have.

Mr. Sonnett: Your Honor, I am informed that the clerk of the Circuit Court of Appeals will not docket for hearing before the summer recess any matter at this time, except by special direction of the Circuit Court of Appeals. While I am sure that I would happily join in any review of your Honor's decisions, it seems to me that any attempt to procure a review prior to the final judgment will not succeed at this time unless the Circuit Court decides to set this down specially.

Mr. Davis: We always have to get the Circuit Court to agree to a date.

The Court: They have ten days in which to act on the application. If I were to grant the 1292(b) you must apply within ten days to the Court of Appeals to have the matter come up.

Mr. Sonnett: I am speaking only as to the question whether this matter can be heard.

The Court: You will know that within ten days. They will let you know whether you are coming up or not. You can argue with them that it would be wasting time if you are going to be held till the Fall.

Mr. Davis: I understand, your Honor, in any event, the dismissal of the counterclaims will be in the form of a

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54(b) judgment which will be appealable, anyway, and we might be able to get both things up together.

The Court: It doesn't make much sense for one to go up without the other.

Mr. Davis: A form of judgment referring the matter to the Special Master for determination of damages on whatever ground rules to be established which would be certified would permit us to go.

The Court: I will think about that overnight.

Opinion and Order, May 3, 1963

[Doc. 191]

[CAPTION]

61 Civ. 2324

METZNER, D. J.:

The plaintiff Trans World Airlines, Inc. (TWA) has moved for an order pursuant to rules 37(b)(2)(iii), 37(d) and 55(b)(2) of the Federal Rules of Civil Procedure directing the entry of a judgment by default against the defendant Hughes Tool Company (Toolco). It requests that a hearing be held to determine the amount of damages to be paid by Toolco for the injuries alleged in the complaint, and that Toolco divest itself of all of its right, title and interest in the stock of TWA. The motion also seeks leave to increase the *ad damnum* clause following paragraph 70 of the complaint, from \$105,000,000 to \$135,000,000. It further seeks a dismissal of the counterclaims with prejudice. The motion further requests that Toolco, its officers and employees, or anyone acting in concert with them, be enjoined from instituting any action based upon the counterclaims set forth in the answer of Toolco and from instituting any proceeding before an administrative agency of the United States in which TWA is a party and which is based upon the allegations of the counterclaims. Finally, it is requested that the claims asserted by TWA against the defendant Holliday be severed from these proceedings.

Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco. It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally.

The deposition of Hughes was originally scheduled for September 24th, 1962 and was adjourned by the court to

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October 29th, 1962. On October 25th the Special Master adjourned the deposition of Hughes to February 11th, 1963. On December 28th, 1962 the Special Master stated that when this adjournment was granted there was no doubt that it was the intention and expectation that the deposition would start on the adjourned date and proceed until it was concluded according to law.

In the pretrial order of January 10th, 1963 the court affirmed this ruling of the Special Master, and stated that the date of February 11th, 1963 would be adhered to in the absence of extraordinary circumstances. The order of January 10th also directed Toolco to produce certain documents as to which it claimed an attorney-client privilege. The order pointed out that Toolco's opposition to producing such documents was in fact a reargument of the order of this court dated July 24th, 1962 which denied the claim of privilege.

The order of January 10th also denied Toolco's application to proceed at that time with the examination of two witnesses on the ground that such deposition would interfere with the taking of the Hughes deposition scheduled for February 11th.

On January 15th counsel for Toolco moved for an order that the Hughes deposition be taken on written interrogatories, or, in the alternative, that the motion to dismiss the complaint, pending since August 9th, 1961, be brought on for hearing. On January 16th Toolco's counsel was informed that he would be given until February 1st to submit all papers in support of his motion to dismiss. On January 19th Toolco's motion to take Hughes' deposition in writing was denied. The court, however, allowed counsel for Toolco time to indicate whether he desired the place of deposition to be changed for the convenience of Hughes. No such request was ever made.

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On January 23rd the Court of Appeals denied Toolco's application for a stay of the orders of January 10th and 19th.

On February 1st, on Toolco's appeal from an order of the Special Master, the court affirmed that order, and directed that Toolco produce certain tax documents to TWA on a daily basis up to February 11th.

On February 6th a hearing was held on Toolco's motion to dismiss the complaint. The motion was denied from the bench with an indication that the formal opinion would be filed the following day. The denial of the motion embraced a finding that the court had jurisdiction of the claims. Toolco was granted a stay of deposition-discovery proceedings until 5 p.m. on February 8th, to afford it an opportunity to apply to the Court of Appeals for a further stay pending an application for a writ of mandamus.

The formal opinion of February 7th, denying Toolco's motion to dismiss the complaint, pointed out that the grounds urged for a dismissal existed and were adverted to in the original notice of motion filed on August 9th, 1961, and served several weeks prior to the assignment of this case for all purposes, pursuant to rule 2. The court indicated that counsel for Toolco could just as well have argued the motion at the inception of the litigation, instead of waiting until the taking of the deposition of Hughes was imminent.

A pretrial conference was held on Friday, February 8th, at 5 p.m., on information that counsel for Toolco was not going to proceed with the deposition proceedings of Hughes on the following Monday. Toolco did not apply to the Court of Appeals for a stay pending an application for a writ of mandamus, but, rather, submitted a "Notice of Position" to the court at the time of the hearing. In essence, this docu-

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ment stated that because of the enormous expenses that would be incurred in further pretrial and trial proceedings, which in Toolco's belief would exceed the amount of damages provable by TWA under the complaint, Toolco decided to rest on the merits of its position, so that the Court of Appeals would have an opportunity to rule upon the propriety of the denial of the motion to dismiss the complaint.

At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a "business decision."

Counsel for Toolco specifically stated that Hughes would not appear for deposition on February 11th and that if it were necessary to clarify the record everyone could gather on the following Monday (February 11th) to

"note the fact that the Tool Company is failing in (sic- and?) [sic] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it."

Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims.

Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above.

On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes

Opinion and Order, May 3, 1963

is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b)(2)(iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.

That branch of the motion seeking to increase the *ad damnum* clause from \$105,000,000 to \$135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); *Peitzman v. City of Illmo*, 141 F.2d 956 (8th Cir. 1944); *cert. denied*, 323 U.S. 718 (1944); *cf. Riggs, Ferris & Geer v. Lillibridge*, Docket No. 27814, 2d Cir., April 10, 1963.

Before entering the final judgment a hearing must be held to determine the amount of damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to rule 55(b)(2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the court, who has presided over the deposition-discovery proceedings for the past year.

TWA has also requested that Toolco divest itself of its 78% stock interest in TWA. The propriety of granting this prayer for relief will be determined by the court.

Opinion and Order, May 3, 1963

The determination of the application by TWA for an injunction will be held in abeyance pending the entry of the final judgment.

The application to sever the action against Holliday has been withdrawn on his election to be individually bound by the defaults of Toolco. Consequently, the application for a default judgment is deemed to include a request for similar relief against this defendant, and the disposition of this motion as to Toolco is also dispositive as to Holliday.

I am of the opinion that this order involves a controlling question of law (see *Pan American Airways, Inc. v. United States*, 371 U.S. 296 (1963)) as to which there is a substantial ground for difference of opinion. Enormous expense has already been incurred in this litigation, and the hearings before the Special Master on the question of damages, with a potential recovery of \$135,000,000 on the first two claims and \$10,000,000 on the third claim, may well be prolonged. An immediate appeal from this order is justified, since it may materially advance the ultimate termination of this litigation.

So ORDERED.

Dated: New York, New York
May 3, 1963

CHARLES M. METZNER /s
U. S. D. J.

[The above opinion also appears at 32 F.R.D. 604.]

**Opinion and Order of May 3, 1963 Granting
Additional Defendants' Motion to Dismiss
(Memorandum Endorsed on Motion Papers
Dated February 15, 1963)**

[Doc. 179 B]

Trans World Airlines v. Hughes, 61 Civ. 2324

For all of the reasons stated in the opinion and order entered on the companion motion by Trans World Airlines, Inc. for a default judgment and dismissal of the counterclaims with prejudice, this motion by the additional defendants is granted. The counterclaims alleged against these additional defendants are dismissed with prejudice and final judgment is directed to be entered accordingly, pursuant to F.R.C.P. 54(b) on the ground that there is no just reason for delay.

So ORDERED.

Dated: New York, New York
May 3, 1963

/s/ CHARLES M. METZNER
U.S.D.J.

**Judgment of the Court of Appeals on Interlocutory
Appeal, Entered July 10, 1964 (Docket No. 28405)**

[Doc. 478]

[CAPTION]

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, at the United States Court-
house in the City of New York, on the day of June,
one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBAED,
Chief Judge,

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

**Appeal from the United States District Court for the
Southern District of New York.**

**This cause came on to be heard on the transcript of
record from the United States District Court for the South-
ern District of New York, and was argued by counsel.**

**ON CONSIDERATION WHEREOF, it is now hereby ordered,
adjudged, and decreed that the said District Court be and
it hereby is found to have had jurisdiction of the action**

A-325

*Judgment of Court of Appeals on Interlocutory Appeal,
Entered July 10, 1964 (Docket No. 28405)*

and that the orders of the Civil Aeronautics Board do not constitute a good defense to the antitrust claim of the plaintiff.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

**Judgment of the Court of Appeals Affirming Dismissal
of the Counterclaims, Entered July 10, 1964
(Docket No. 28406)**

[Doc. 479]

[CAPTION]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, at the United States Courthouse in the City of New York, on the second day of June one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby is affirmed with the exception of the said order dealing with the second counterclaim.

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*Judgment of the Court of Appeals Affirming Dismissal
of the Counterclaims, Entered July 10, 1964
(Docket No. 28406)*

Further ordered, adjudged and decreed that the second counterclaim be and it hereby is dismissed for lack of jurisdiction.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

**Opinion of the Court of Appeals in Dockets No. 28405
and No. 28406**

[Doc. 478]

[CAPTION]

Before:

**LUMBARDE, Chief Judge,
KAUFMAN and HAYS, Circuit Judges.**

Docket No. 28405

Interlocutory appeal, under 28 U. S. C. §1292(b), from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, J., which granted default judgment in favor of the plaintiff because of the defendants' failure to produce the managing agent of one defendant for examination and their failure to produce certain papers and documents. 32 F. R. D. 604 (S. D. N. Y. 1963).

Pursuant to an order of this court of June 6, 1963, the appeal is limited to two questions: (1) Whether the district court had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the antitrust claims of the plaintiff.

The court finds that the district court had jurisdiction of the action and that the CAB orders do not constitute a good defense to the antitrust claims of the plaintiff.

Docket No. 28406

Appeal from orders of the United States District Court for the Southern District of New York, Charles M. Metzner, J.,

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which dismissed with prejudice the defendants' first five counterclaims and which granted summary judgment in favor of the plaintiff on the sixth counterclaim, because of the defendants' failure to produce the managing agent of one defendant for examination and their failure to produce certain papers and documents.

Affirmed with respect to all but the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

LUMBARD, Chief Judge:

These separate appeals, heard together, are from two orders of the United States District Court for the Southern District of New York in the same case. In the first appeal, No. 28405, the defendants, Hughes Tool Company (Toolco) and Raymond M. Holliday, Toolco's chief financial officer, attack the validity of an order which granted default judgment in favor of the plaintiff, Trans World Airlines, Inc., because of the defendants' failure to produce Toolco's managing agent, Howard R. Hughes, for examination and their failure to produce certain papers and documents. 32 F. R. D. 604 (S. D. N. Y. 1963). In the second appeal, No. 28406, Toolco attacks an order which dismissed with prejudice its first five counterclaims against TWA and a group of additional defendants and an order of the same date which granted summary judgment in favor of TWA on the sixth counterclaim.

TWA's complaint charged the defendants with a variety of violations of the antitrust laws as well as with having committed willful and malicious injury to TWA's business, and sought divestiture of Toolco's interest in TWA, injunctive relief, and money damages, trebled with respect to the

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antitrust violations. On May 3, 1963, Judge Metzner ordered the entering of a default judgment in favor of TWA against Toolco¹ but referred to a special master the issue of damages, on TWA's claim of \$35,000,000 which the antitrust statute would treble, and retained for further consideration the question of divestiture. Judge Metzner did certify under 28 U. S. C. §1292(b) that immediate appeal was justified inasmuch as a controlling question of law was involved and hearings on the question of damages might be prolonged. We granted leave to appeal limited to two questions: first, whether the district court lacked jurisdiction of the treble damage action by reason of primary jurisdiction over these matters residing in the Civil Aeronautics Board; and second, whether the issuance of certain orders by the CAB permitting the defendant to take certain actions constitutes a good defense to the antitrust action. Thus the propriety of the court's entering a default judgment against the defendants with respect to the complaint is not before us and we consider it only in connection with the court's dismissal of the five counterclaims asserted by the defendants. The second appeal is taken as of right from a final judgment which dismissed Toolco's first five counterclaims and granted summary judgment to TWA on the sixth counterclaim.

BACKGROUND OF THE LITIGATION

An understanding of the issues requires a preliminary statement of certain background facts set forth in the pleadings and which on this record and in view of the default of the defendants we must take as established.

¹ Due to the relationship of the parties, the district court accepted the election of defendant Holliday, an officer and director of Toolco, to be bound by Toolco's decision to forego further discovery proceedings.

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Commencing about five years after TWA was organized in 1934, Toolco, which at all times has been 100 percent owned and controlled by Howard Hughes, began to purchase TWA common stock, and by 1944 it held 45 percent of this stock. By 1958 Toolco had increased to 78 percent its interest in TWA's common stock; from 1944 until December 1960 it nominated a majority of TWA's directors.

Since 1955 the commercial air industry has largely converted to the use of jet aircraft. TWA's competitors began in that year to aid in the development of and to purchase jet planes. Prior to 1955 Toolco had entered into an arrangement with the General Dynamics Corporation (Convair) for the joint development of jet aircraft, but in that year the two companies terminated the arrangement. Toolco had also entered into a plan whereby it would develop and manufacture its own jet aircraft for sale or lease to TWA and its competitors. That plan was abandoned during 1956. During this period, Toolco arranged for the purchase on its own account of jet aircraft from Convair and the Boeing Company, these arrangements providing that Toolco could assign to TWA its rights to such aircraft.

Despite repeated requests by TWA, Toolco refused to assign any planes to TWA during the period 1956 to 1960. The only jet-powered aircraft which the defendants permitted TWA to use during this period were leased on a day-to-day basis by Toolco to TWA during 1959 and 1960 on the condition that TWA would not purchase or lease aircraft from any other potential supplier.

At some time prior to May 1960 Toolco and Atlas Corporation, which owns a controlling stock interest in Northeast Airlines, entered upon a plan to have Northeast propose to TWA a merger of the two air carriers. In November 1960, while the proposed merger plan was pending,

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Toolco diverted to Northeast six of the Convair jet aircraft which by previous agreement it had assigned to TWA.

The defendants pursued a continuous policy of refusing to permit TWA to undertake equity financing except on the condition that Toolco increase its equity position in TWA; as a result TWA was limited to obtaining funds through debt financing. When in 1960 Toolco and Hughes finally agreed to outside financing for TWA, the cost of such financing had risen greatly and the financing could be arranged only on less favorable terms than had theretofore been available, terms which had been secured by TWA's competitors. Under the 1960 financing arrangement Toolco's stock in TWA was placed in a voting trust.¹² The CAB approved this financing arrangement and the voting trust on December 29, 1960, finding that these arrangements were in the public interest. Thereupon, the Metropolitan Life Insurance Company and the Equitable Life Assurance Society loaned TWA \$92,800,000 and a group of banks for which the Irving Trust Company acted as agent loaned TWA \$72,000,000. In March 1961 TWA's Board of Directors authorized the purchase of 26 Boeing jet aircraft. Thereafter the defendants continued their attempts to have TWA purchase from Toolco jet aircraft which Toolco had previously agreed to purchase from Convair. The defendants have also continued to press their demand for

¹² The commitments of the various lending institutions had been conditioned upon the continuation of satisfactory TWA management. The lenders reserved the right to insist upon a voting trust during the term of the loan in the event of a change in TWA management which they deemed to be adverse to TWA's credit position. When Charles Thomas abruptly resigned as president of TWA in July 1960 the lenders offered to effect the transaction if Toolco agreed to place its stock in TWA in a voting trust. In December 1960 Toolco executed the voting trust agreement.

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a merger of TWA and Northeast and have otherwise, despite the existence of the voting trust, attempted to prevent TWA from acquiring jet aircraft other than from Toolco.

THE FIRST APPEAL—Docket No. 28405

TWA's complaint alleges that the facts heretofore stated constitute violations of the Sherman and Clayton antitrust acts, insofar as the defendants have attempted to monopolize a substantial segment of interstate and foreign commerce and trade, have required that TWA boycott all suppliers of aircraft other than Toolco, and have agreed to provide financing and to sell aircraft to TWA on the condition that TWA not purchase or lease the goods of a competitor. The defendants assert that the Civil Aeronautics Board possesses primary jurisdiction over these matters and in the exercise of its powers has approved all of the transactions alleged in the complaint and thereby immunized the defendants from the operation of the antitrust laws. Judge Metzner held that nothing in the Federal Aviation Act precludes the district court from asserting jurisdiction in this case and that the CAB's approval of various transactions between TWA and Toolco did not confer immunity upon the defendants from the operation of the antitrust laws. We agree.

The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. See *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945). Yet Congress may effect such a design through explicit enactment of an immunizing

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provision, and Congress has done so on occasion.² Under §408(a)(6) of the Federal Aviation Act, 49 U. S. C. §1378(a)(6), no person engaged in any phase of aeronautics³ may lawfully acquire control of any air carrier without the prior approval of the CAB. Section 411 empowers the Board to order any air carrier to cease and desist from "unfair or deceptive practices or unfair methods of competition." Section 414 of the Act provides that any person affected by any order made under § 408⁴ "shall be, and is hereby, relieved from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In attempting to ascertain the extent of the antitrust immunity conferred by the Aviation Act we do not explore wholly uncharted territory. In *Pan American World Airways, Inc. v. United States*, 371 U. S. 296 (1963) (*Panagra*), a case upon which all parties in this litigation principally rely, the Supreme Court considered the extent to which the Aviation Act has granted the CAB jurisdiction over matters involving the commercial aviation industry which might otherwise constitute antitrust violations.

² See, e.g., Clayton Act §16, 38 Stat. 737 (1914), as amended, 15 U. S. C. §26 (1958); Shipping Act §15, 39 Stat. 734 (1916), 46 U. S. C. §814 (1958); Interstate Commerce Act §5a(9), 62 Stat. 473 (1948), 49 U. S. C. §5b(9) (1958).

³ In *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C. A. B. 153 (1944), the Board determined that Toolco was engaged in a phase of aeronautics and thus subject to Board action under §408.

⁴ Section 414 applies to 49 U. S. C. §1379 (interlocking relationships) and 49 U. S. C. §1382 (pooling and other agreements) as well as to §408.

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Pan American, a major airline in interstate and foreign commerce, and W. R. Grace & Co., a common carrier, were charged in a civil action brought by the United States with violations of the antitrust laws arising from their relations with Panagra, an airline which had been formed by Pan American and Grace, each of which owned 50 percent of its stock. The government's complaint alleged restraints of trade in that Pan American and Grace had agreed that Panagra would have the exclusive right to traffic along the west coast of South America free of Pan American competition and that Pan American would enjoy the exclusive right to traffic in other areas in South America and between the Canal Zone and the United States; that Pan American and Grace had conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires; and that Pan American had exercised its 50 percent control over Panagra to prevent it from securing authority from the CAB to extend its service from the Canal Zone to the United States.

The district court found a single violation in Pan American's activities with regard to the extension of Panagra's routes and ordered divestiture of Pan American's stock interest in Panagra. On direct appeal from the district court, the Supreme Court reversed the lower court judgment on the ground that the questions presented by the government's complaint had been entrusted to the CAB and the district court therefore lacked jurisdiction in the premises.

Noting that those aspects of antitrust problems entrusted to the Board are "but a fraction of the total," the Court emphasized that the limitation of routes, the division of territories, and the relation of common carriers to air

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carriers are "basic to [the] . . . regulatory scheme" of the Federal Aviation Act and that the acts charged in the government's complaint are "precise ingredients of the Board's authority." The term "unfair methods of competition" in §411, the Court noted, must gather meaning from the context of the regulatory scheme envisioned in the Act, and it would be strange if the "public interest" standard incorporated into §411⁵ was deemed satisfied by the Board as to a particular transaction and yet that transaction was violative of the antitrust laws; it would be equally strange for a transaction approved under §408 by the Board to be adjudged subsequently to be in violation of the antitrust laws.

⁵ Title 49 U. S. C. §1302 provides:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

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The striking dissimilarities between the operative facts in *Panagra* and those in the instant case as well as the whole tenor of the Supreme Court's opinion compel us to the conclusion that the district court properly asserted jurisdiction in this cause. The relationship between the allegedly unlawful activities in *Panagra* and the scope of the Board's powers to deal with such activities was direct. Under 49 U. S. C. §1371, it is the specific function of the CAB to certify airlines to operate on a particular route between terminal points directed by the Board. The unlawful division of territories and allocation of routes with which Pan American, Grace and Panagra were accused were therefore directly within the ambit of powers explicitly granted the Board by the Congress. To permit the courts to intrude into this area would have been, as the Court noted, to permit the erection of an independent yet parallel body of law in direct contravention of the regulatory scheme embodied in the Aviation Act.

By contrast, in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB. The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter. Thus the plaintiff's complaint

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enumerates a variety of transactions over which the Board is given no explicit jurisdiction by the Act: an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco.

Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby retain a continuing jurisdiction over the activities of the controlling party.⁶ In the exercise of this supplementary power the Board may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB. The issue here is not whether the CAB may consider such matters but rather whether the

⁶ Section 408 provides, in pertinent part:

"Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . ."

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federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters.

In *Panagra* the Civil Aeronautics Board could have considered the activities of Pan American under its broad power set out in §411 of the Act to "investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation . . . , " a provision to which the Supreme Court explicitly adverted in holding that the matters there in dispute had been specifically entrusted by Congress to the Board. By contrast, the Board enjoys no such power to deal with the allegedly unlawful activities of Hughes and Toolco, inasmuch as §411 is applicable solely to "any air carrier, foreign air carrier, or ticket agent." The limited applicability of §411 merely underscores the limited jurisdiction conferred by Congress upon the Board to deal with the multifarious antitrust problems which may arise in the management and operation of the commercial air industry. Moreover, it is not even clear that the Board any longer possesses any jurisdiction over the activities of Hughes and Toolco, even under §408 of the Act, inasmuch as the voting trust arrangement adopted in 1960 appears to have ousted Hughes and Toolco from control over the operations of TWA, such control being a prerequisite to the Board's acting under §408.

We are reinforced in our conclusion by the Supreme Court's recognition of the limitations of its holding in

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Panagra. Characterizing the questions presented in the government's complaint as "narrow" ones, the Court, as we have noted, emphasized that the antitrust problems entrusted by the Act of the Board "encompass only a fraction of the total." The activities here drawn into issue by TWA's complaint fall without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction.

The Aviation Act itself bears testimony that matters such as those with which we are here concerned were not intended to be placed without the competence of the federal judiciary. Title 49 U. S. C. §1506 declares that "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action—the award of money damages, trebled under the mandate of the antitrust laws.

Even if we were to view as the subject of judicial discretion the question whether the CAB is to be given primary jurisdiction in the consideration of activities such as those here alleged, we could find no compelling reason to adopt such a course on the facts presented. While the entire regulatory scheme of the Federal Aviation Act demands that the Board be given great latitude in fashioning public policy with regard to the development of the commercial air industry through the acquisition of control over air carriers—and the Board possesses a substantial expertise in these matters—there is no such necessity for a uniformity of policy with regard to the consideration of the validity of individual transactions effected between an air carrier and its controller which are alleged to be

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unlawful under the antitrust laws. Nor is the Board any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems. The disposition of such matters by the courts would not intrude upon the Board's function of fashioning the broad framework of control for the commercial air industry. We can thus find no warrant for adopting the position that the subject matter of this litigation was entrusted by Congress to the exclusive jurisdiction of the Civil Aeronautics Board.

Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions. Title 49 U. S. C. §1384 extends such immunity only "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction which Toolco might choose to effect in the exercise of its control. To give §408 such a carte blanche effect would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship.

In its original grant of approval of the acquisition of control over TWA by Toolco,¹ the Board restricted commercial transactions between the two companies to "transactions involving complete items of property, the price of

¹ *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C. A. B. 153 (1944).

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which does not exceed \$200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed \$10,000." Over the years the Board has occasionally modified this order to permit specific intercompany transactions. In 1959 and 1960 the Board issued five such modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation. In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted upon TWA.* Order No. E-13873, issued on May 15, 1959, for example, states that the modification "is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at Hughes' actual cost a supply of spare parts, not to exceed \$3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare jet engines to TWA." The Board stated in its order that the proposed arrangements did not violate the purpose of the original restriction in the control approval and that the modification ordered was just and reasonable and in the public interest; but the Board was careful to emphasize that its action should not be deemed a determination for rate-making purposes of the reasonableness of the transactions. There is no indication whatsoever—or any reason to believe—that the Board had been given any indication of the conditions which had been attached to Toolco's

* See Order No. E-13542, February 26, 1959; Order No. E-13873, May 15, 1959; Order No. E-14169, July 1, 1959; Order No. E-14504, September 30, 1959; Order No. E-14877, January 29, 1960.

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agreements with TWA. The Board's approval extended only to the individual transactions involved in these orders, not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected. There is thus no cause to hold that these individual and narrow Board orders immunized the defendants from the operation of the anti-trust laws with respect to activities not specifically ruled upon by the Board.

The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and foreign air commerce—are on their face insufficient to support a claim of antitrust violations, a claim which surely falls within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendant denied the plaintiff the right through pre-trial discovery to add more

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detail and substance to the allegations set forth in the complaint. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U. S. 41, 47 (1957). See *Dioguardi v. Durning*, 139 F. 2d 774 (2 Cir. 1944); *Knudsen v. Torrington Co.*, 254 F. 2d 283 (2 Cir. 1958). Of course the Federal Rules apply with equal force to suits under the antitrust laws. *Nagler v. Admiral Corp.*, 248 F. 2d 319, 322-23 (2 Cir. 1957). We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction.

THE SECOND APPEAL—Docket No. 28406

The defendants also appeal, as of right, from orders of the district court which dismissed with prejudice their first five counterclaims asserted against TWA and a group of additional defendants and which granted summary judgment in favor of TWA on a sixth counterclaim, because of the defendants' failure to produce Hughes for examination and their failure to produce certain papers and documents. The additional defendants are the three major lending institutions which participated in the 1960 financing and voting trust agreements, certain of their officers, the incumbent president and chairman of the board of directors of TWA, and an investment banking concern which since early in 1959 has served as TWA's principal financial adviser.

The proper consideration of this appeal requires a chronological exposition of the lengthy and complicated pre-trial proceedings engaged in by the parties. Late in 1961 Judge

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Metzner was assigned to serve as a judge for all purposes in this litigation under General Rule 2, General Rules of the United States District Courts for the Southern and Eastern Districts of New York. By order of February 7, 1962, Judge Metzner confirmed a series of prior orders which had awarded Toolco priority in the conduct of pre-trial discovery, and he then appointed J. Lee Rankin, Esq. as Special Master to supervise the conduct of the discovery proceedings.

Shortly after the filing of the answer and counterclaims on February 12, the Special Master granted Toolco's motions to have the additional defendants produce a multitude of documents. On March 5, Judge Metzner modified the February 7 order so as to limit Toolco's priority in discovery to evidence which bore on the plaintiff's claims against Toolco. The March 5 order stated that "The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions." The court further ordered that upon the completion of the additional defendants' deposition proceedings Toolco could complete its own deposition proceedings.

On February 16, the Special Master had granted the motion of the additional defendants for the production of certain documents by Toolco. Toolco withheld certain of these documents on a claim of attorney-client privilege. After full consideration, the Special Master ordered the production of these documents on April 17. After affirmance by the district court of this order and of a second order to produce issued by the Special Master, and denial of review by this court, counsel for Toolco, in a letter to Judge Metz-

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ner on January 23, 1963, declared that Toolco would refuse to comply with any of these orders.

Meanwhile, on September 6, 1962, counsel for Toolco had accepted a subpoena calling for Hughes' personal appearance as a witness returnable on September 24, 1962. The district court later set October 29 as the date for the Hughes deposition. The court went on to adopt as its own a prior decision of the Master that in view of the close connection between Hughes and Toolco, Toolco would be responsible for Hughes' actions with respect to the subpoena, and that if Hughes failed to communicate with the Special Master he would be deemed to have acquiesced in this interpretation. No communication from Hughes was received by the Master.

On October 25, 1962, the Master granted Toolco's motion to adjourn the Hughes deposition, but set February 11, 1963, as a firm date therefor. By order of January 10, 1963, the district court affirmed the setting of this date, stating that "this date will be adhered to in the absence of extraordinary circumstances." Shortly thereafter, Toolco moved to hold the Hughes deposition on written interrogatories and to bring on for hearing its motion, pending since August 8, 1961, to dismiss the complaint for failure to state a claim upon which relief may be granted. On January 19, 1963, the district court denied the first motion.

In preparation for the Hughes deposition, the additional defendants had moved on January 9, 1963, for the production by Toolco of certain income tax returns, revenue agents' reports, accountants' work sheets and other documents which would allegedly substantiate a claim that Toolco and Hughes had been motivated by a desire to reap tax benefits at TWA's expense in their dealings with TWA concerning the acquisition of a jet-powered fleet of air-

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craft. On January 22, 1963, the Master ruled that the documents were relevant to the issues in the case and that their production would not place an unreasonable burden upon Toolco. On February 1, the district court affirmed the order to produce, but Toolco failed to produce the documents, despite repeated demands by TWA and the additional defendants.

On February 6, 1963, five days before the scheduled Hughes deposition, Toolco filed a complaint with the Civil Aeronautics Board charging the additional defendants with violations of the Federal Aviation Act. On the same day Toolco moved the district court for a stay of all proceedings on the counterclaims pending disposition by the CAB of the Toolco complaint, on the ground that under the Supreme Court's decision in *Panagra*, filed on January 14, 1963, the Board possessed exclusive jurisdiction over the subject matter of the counterclaims. On February 6 the district court denied Toolco's motion to dismiss the complaint, 214 F. Supp. 106 (S. D. N. Y. 1963), and on February 8 it denied Toolco's motion for a stay of all proceedings on the counterclaims.

On February 8 counsel for Toolco informed the district court that Toolco had made a "business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. Consequently, counsel for Toolco stated, Hughes would fail to appear for the deposition ordered for February 11. He further stated that Toolco was aware of the sanctions which could be imposed by the district court for such a willful and deliberate failure to proceed with the scheduled discovery proceedings.

The inevitable consequence of Toolco's default in producing Hughes as a witness and in producing the documents

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as the court had directed was that on May 3 the district court granted the motions of TWA and the additional defendants for dismissal of the counterclaims with prejudice, under Rule 37(b)(2)(iii) and Rule 37(d) of the Federal Rules of Civil Procedure. From the final judgments entered pursuant to that decision, and from a final judgment entered the same day granting TWA's motion for summary judgment on the sixth counterclaim, Toolco appeals.

Inasmuch as the sixth counterclaim raises issues unrelated to the first five counterclaims, we shall treat the sixth counterclaim separately.

The First Five Counterclaims

The appellants raise several contentions: first, that the district court should have granted their motion for a stay of all proceedings on the counterclaims pending disposition of the complaint which the defendants had filed with the CAB; second, that the district court should have granted the defendants a voluntary dismissal of the counterclaims without prejudice; and third, that the district court orders which directed Hughes to appear for deposition as noticed by the additional defendants, and which directed Toolco to produce the tax documents and the documents involving the attorney-client privilege, were improper.

That there was no cause for granting a stay of all proceedings on the counterclaims appears clear from the nature of these counterclaims. The first counterclaim alleges that the additional defendants and the present management of TWA improperly sought to perpetuate their control over TWA by preventing termination of the voting

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trust according to its terms. The second charges that Metropolitan and Equitable had acquired control over TWA in violation of §408 of the Aviation Act. The third counterclaim is brought derivatively on behalf of TWA and asserts that the additional defendants and the present TWA management have conspired in violation of the anti-trust laws to monopolize the supplying of financing to air carriers. The fourth restates the allegations of the third counterclaim and alleges that Toolco has suffered damages in excess of \$77,000,000. Finally, the fifth counterclaim charges a common law conspiracy to interfere with Toolco's rights as the owner of 78 percent of the stock of TWA and to extend the duration of the voting trust beyond the period permitted by the applicable Delaware statute.

In the light of the views we have above expressed regarding the first appeal, it is plain that all of these counterclaims save the second fall beyond the scope of the CAB's exclusive jurisdiction. They deal with alleged misconduct on the part of the lending institutions in their dealings with TWA and Toolco and in no respect with matters specifically entrusted to the Board in the Act. Acts such as those alleged in all but the second counterclaim may properly be made the subject of an action in a federal district court. Inasmuch as the Board possessed no exclusive jurisdiction as to these claims, the defendants presented no adequate basis for a stay of proceedings.

As for the second counterclaim—which alleges a violation by the additional defendants of §408 of the Aviation Act—the Board clearly possesses exclusive jurisdiction. Under that section, the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue. The court should have dismissed

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this counterclaim for lack of jurisdiction, and we direct the modification of the judgment below accordingly.

The defendants maintain that the district court should have granted a voluntary dismissal without prejudice of the counterclaims. It suffices merely to note that at no juncture in the proceedings below did the defendants request that the court grant such relief. Indeed, the very purpose for the defendants' "business decision" to terminate all pre-trial discovery was to gain judicial review of the positions which the defendants had taken below.

Finally, the defendants contend that the district court's dismissal with prejudice of the counterclaims was invalid because the discovery orders upon which the district court based its order under Rules 37(b)(2)(iii)⁹ and 37(d)¹⁰ were improper.

⁹ Rule 37 provides:

"(b) Failure to Comply With Order.

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . ."

¹⁰ Rule 37 provides:

"(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

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We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation, and his willful and deliberate default constituted a sufficient basis under Rule 37 for the dismissal of the counterclaims with prejudice. Hughes has at all times been the sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes. Although the defendants contend that the February 11, 1963 deposition was to be held solely for the benefit of TWA, Judge Metzner's order of February 7, 1962 made clear that the additional defendants could schedule separate deposition proceedings of their own, or in the alternative participate in TWA's deposition proceedings. On February 14, 1962, the additional defendants served notices to examine Toolco by Hughes, its managing agent. The additional defendants had the right under Judge Metzner's order to treat as their own the Hughes deposition scheduled for February 11, and it is abundantly clear from the record that they did so.

When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the

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efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See *Nasser v. Isthmian Lines*, 2d Cir., Docket No. 28591, April 6, 1964; *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962); *Gill v. Stelow*, 240 F. 2d 669 (2 Cir. 1957).

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a "business decision" to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted anti-trust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See *Handbook of Recommended Procedure for the Trial of Protracted Cases*, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F. R. D. 351 et seq. (1960).

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In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year.

We are also of the view that the other two discovery orders were properly issued. After careful examination of the documents, both the Special Master and the district court determined that the attorney-client privilege claimed by the defendants as to the first group of documents had been waived as the result of the defendants' pleading advice of counsel as a defense and as the result of two affidavits, one of which was submitted to the CAB by Raymond A. Cook, one of Toolco's attorneys. As the Master noted, the Cook affidavit purports to be based upon information received by Cook as Attorney for Toolco and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by Toolco of the attorney-client privilege. As for the documents concerning income tax information, there can be little question of the relevance of this material to the litigation. The additional defendants might well have based a defense to the counterclaims upon a showing that Toolco's and Hughes' activities with regard to the financing of aircraft acquisitions by TWA were motivated by a desire to reap income tax benefits for Hughes at the expense of TWA.

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Of course, the test of relevance for discovery purposes is less stringent than that applied to the admissibility of evidence at trial. Moore, Federal Practice ¶34.10. The district court properly ordered the production of the tax documents.

The Sixth Counterclaim

The December 1, 1960 financing agreement required the subordination of prior indebtedness of TWA to Toolco, to be achieved through the issuance by TWA of interim subordinated notes in payment *pro tanto* of the prior indebtedness. TWA was then obliged to offer to its stockholders the right to purchase, at least at par, \$100 million worth of subordinated debentures. The interest on both the interim notes and the debentures was set at 6½ percent. Toolco agreed to purchase the "principal amount" of the unsubscribed debentures within three business days of the close of the subscription offering. The agreement further provided that "TWA shall . . . refund the Interim Subordinated Notes . . . upon the purchase by Hughes [Toolco] of [the] Subordinated Debentures . . . and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase." The transaction was to be completed by TWA's turning over to Toolco the cash received from the subscription offering in addition to accrued and unpaid interest on the interim notes to the date of refunding.

The subscription offering expired on June 8, 1961. On June 13, three business days thereafter, TWA delivered

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to Toolco some \$19 million in cash received in the offering and nearly \$81 million in unsubscribed debentures, totalling \$100 million, the amount of the interim notes. TWA also paid Toolco interest on the \$100 million to June 8 and interest on the \$19 million through June 12. TWA paid no interest on the \$81 million from June 8 through June 12 on the ground that it was substituting interest-bearing debentures for the interim notes.

In its sixth counterclaim, Toolco contends that under the terms of the financing agreement, TWA was obliged to pay interest on the interim notes to the date of refunding, June 13, and that TWA's failure to pay such interest resulted in Toolco's paying more than par value for the subordinated debentures, in violation of the terms of the agreement. We agree with Judge Metzner who found that "based on the overall arrangements between the parties, . . . it was their intention to substitute the debentures for the interim notes and that payment of double interest for the five days was not the intendment of the parties." The fact that the subordinated debentures were issued as of June 8 and bore interest from that date, in the same amount as the interim notes, indicates that the exchange for the notes was to be effective as of that date. The provision for having the closing three business days thereafter was merely to afford time for the preparation for that transaction. The most plausible reading of the financing agreement would seem to be one which eliminates the double interest for the period between June 8 and June 13 which Toolco now seeks. Judge Metzner properly granted summary judgment to TWA on this counterclaim.

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CONCLUSION

As to the first appeal, we find that the district court had jurisdiction of the action and that the Civil Aeronautics Board orders do not constitute a good defense to the anti-trust claim of the plaintiff.

The orders of the district court in the second appeal are affirmed with the exception of the order dealing with the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

[The above opinion also appears at 332 F.2d 602.]

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[Doc. 481]

[CAPTION]

61 Civ. 2324

This matter comes on before the undersigned Special Master by designation of the Hon. Charles M. Metzner, District Judge, in his order of May 3, 1963. After entering a default judgment against the defendants in that order, he directed that "before entering the final judgment a hearing must be held to determine the amount of damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to Rule 55(b)(2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the Court who has presided over the deposition-discovery proceedings for the past year."

The default judgment was granted in favor of the plaintiff because of the defendants' failure to produce the managing agent of one defendant for examination, and the failure to produce certain papers and documents in response to the Court's order. The plaintiff, Trans World Airlines, Inc. (TWA), has moved for an order that the Special Master enter interim findings of fact in this cause in substantially the form annexed to its motion and labeled, Exhibit A.

A brief history of the litigation is important to an understanding of the issue now to be decided. The default was appealed to the Court of Appeals of the Second Circuit where pursuant to the Order of the Court on June 6, 1963, the appeal was limited to two questions: (1) Whether the District Court had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted, consti-

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tutes a good defense to anti trust claims by plaintiff. The Court of Appeals, in an opinion of June 2, 1964 by the Hon. Edward Lumbard, Chief Circuit Judge, held that the District Court had Jurisdiction of the action and that the CAB orders did not constitute a good defense to the anti trust claims of the plaintiff.

In the same appeal the action of the District Judge in dismissing with prejudice the defendants' first five counter-claims and granting summary judgment in favor of the plaintiff on the sixth counter-claim because of the defendants' failure to produce Howard R. Hughes for examination and for not producing certain papers and documents was affirmed as to all but the second counter-claim which was dismissed for lack of jurisdiction.

Thereafter, a petition of certiorari was granted by the Supreme Court of the United States to review the action of the lower court. On March 8, 1965 that proceeding was remanded with an order by the Court that the writ be dismissed because it had been improvidently granted.

In support of its motion the plaintiff asserts that an essential preliminary to the presentation of evidence at the inquest on damages is an order formalizing the basic findings derived from the proceedings up to date and in particular from the defendants' deliberate default. Plaintiff asserts that its evidence will consist principally of expert testimony as to the extent of the injury it suffered, and that the findings requested, based on the allegations of the complaint, are the foundation on which such expert evidence will rest. Plaintiff urges that it was intended by Judge Metzner in the Order of May 3, 1963 referred to above, that his decision would act as a final adjudication in TWA's

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favor as to the correctness of all of the allegations of the complaint other than allegations as to the exact amount of damages. Plaintiff also asked "only interim findings strictly based upon the complaint" and merely "as a basis for the submission of its further evidence as to the amount of its damages" which, added to the allegations of the complaint, would fill out "a cause of action." Fifty-four separate interim findings are thus tendered for adoption under plaintiff's motion.

The position of the defendants is that their default does not constitute an admission of any conclusions of law or conclusions of fact. They further contend that it does not admit allegations that are contrary to information which courts take judicial notice of, such as federal agency records like those of the Civil Aeronautics Board or records in the office of the clerk of the Court. They also assert that the default does not admit that the allegations of the complaint constitute a cause of action. The defendants do concede, however, that there has been a determination in this case that the complaint is sufficient and that it is not now open to them to argue that issue.

In addition to the foregoing, defendants urge that even defaulting defendants are entitled to introduce matters outside of the complaint, discrediting the truth of its allegations. This, they assert, they may do by means of materials such as records of administrative proceedings, corporate records, deposition testimony and, in some cases, new material.

It has been suggested in support of the motion that it is the law of the case that the allegations of the complaint are to be taken as true and the court, therefore, has no power

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to reexamine them because of prior rulings in this action. While it is recognized that the principle of the "law of the case," does apply "to everything decided, either expressly or by necessary implication," *Munro vs. Post* 102 F.2d 686, 688 (2nd Cir. 1939), the rule is one which the courts have adopted to advance the orderly conduct of their work and is not inflexible. The rule does not require a court to follow the reasons given earlier by another member of the same court, if it is found that the prior decision was erroneous. See *Dictograph Products Company vs. Sonotone Corp.*, 230 F.2d 131 (2nd Cir. 1956), and *Munro vs. Post* Supra. In any event it is not a limitation on the power of the courts, but merely expresses a practice. *Holmes, J. in Messenger vs. Anderson*, 225 U.S. 436, 444.

Because of the nature of the assignment of a Special Master, the writer would not assume to depart from a ruling of Judge Metzner if he had made it clear that the default in this case was to be different from the ordinary default. The Special Master does not conceive that Judge Metzner either held or intended that the default which he entered in this proceeding would be different from the ordinary default in other proceedings. However, there is a special factor here that must be taken into account in connection with this default, and that is the failure of Howard R. Hughes to testify at the designated time and place. That failure seriously affects the proof that would be available otherwise to the plaintiff from such testimony.

Because of this factor, it is important to review briefly the occasion for the entry of the default in this action. On February 8, 1963 the defendant Tooleo served a "Notice of Position" in which it refused to comply with the Court's orders providing for the taking of the deposition of Howard

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R. Hughes and the supplying of certain documentary evidence or to proceed further with discovery under the plaintiff's complaint. During that day the action of the defendant Toolco was explained and elaborated by its counsel at a hearing. Counsel then advised the court that the action being taken reflected a deliberate decision of the client (emphasis supplied), made with full awareness of the consequences. In this regard he said:

"I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the rules by reason of respectful declination or election to stand on the questions of law which have been decided and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37 (d)—Rule 37 (d)—of the Federal Rules, with respect to the sanctions which could be applied by the court on the Tool Company." (Tr. of Feb. 8, 1963, p. 9)

Further explanation was given of this position by counsel when he stated that:

"The Tool Company does want to rest on the merits of its position and it does so fully aware of the sanctions which the court, in its discretion, may impose upon the Tool Company; and if there is anything I can say that will further clarify what the effect is of the position which the Tool Company is taking, I am prepared to do so." (Tr. of Feb. 8, 1963, p. 11)

Counsel again recognized the consequences of the action and that he had advised his client of the same in the following statement:

"... my client is fully aware ... that by insisting on a right to obtain a review on the legal questions

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which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages." (Tr. of Feb. 8, 1963, p. 12)

The position of Toolco as to the effect of the default was further emphasized when counsel for the plaintiff expressed a desire to proceed with the deposition of Howard R. Hughes notwithstanding Toolco's announced intention to default. Counsel for Toolco, however, urged the court that such action was completely unnecessary in light of the record which he was making. In this regard he said:

"I do not understand what remedy it is that TWA is seeking when it has the opportunity to prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.

"My purpose, of course, is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." (Tr. of Feb. 8, 1963, p. 46)

Relying upon these representations Judge Metzner directed counsel for the plaintiff not to proceed further saying:

"Mr. Davis is telling you he is not going to show up, and Mr. Davis has been the conduit through whom the orders of the Court have been transported to Mr. Hughes, and one of these orders was that if Mr. Hughes did not show up the Court would entertain

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a motion for a default judgment and an assessment of damages.

"If Mr. Davis now tells you that Mr. Hughes is not going to show up, and even if he is going to show up he is not going to use it as a defense to any motion in this Court pursuant to Rule 36, I would think that takes care of that phase of the case. * * * I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made here this afternoon and you may then move for your default judgment." (Tr. of Feb. 8, 1963, pp. 49-50)

In accordance with the Court's direction, the plaintiff moved on February 16, 1963 for the entry of a default judgment in its favor. The motion was brought on by an order to show cause. In opposition, the defendants filed a memorandum on April 29, 1963 urging that it was the Court's responsibility to determine the factual support for the complaint on the basis of "facts which cannot be denied", and "admissions of record" and to require the plaintiff to establish its allegations of fact including violation of the anti trust laws before taking action upon them. The plaintiff in its memorandum of May 1, 1963 contended that the defendants by their own acts had forfeited the right to make such contentions. On May 2, 1963, Judge Metzner had a hearing on these matters and in that hearing said, in part:

"Mr. Davis, I have read your brief very carefully. The great problem I have with it, is I don't think it comes to grips with the point which is so evident here. I intend to hand down a formal opinion in which I will state that there is a finding of a deliberate and wilful default in this case, and predicated upon that fact I can't quite follow the arguments that

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you are making in your briefs. So I want to call upon you first to say anything in clarification of your position." (Tr. pp. 4-5)

It was the position then of counsel for Toolco that the defendants' action did not amount to an admission of the complaint's truth in its entirety and therefore defendants were entitled to contest the allegations of the complaint "based upon the entire record". With regard to this, the Court said:

"I don't think there is any question of admissions here. You didn't admit anything. You willfully defaulted under 37 (b) (2) (iii). I am going to direct the default judgment.

"Mr. Davis: I understand that.

"The Court: The facts of the complaint are admitted, not in the sense of an admission saying, 'Yes, I did it,' but they are true, and the only thing left is how much." (Tr. p. 6)

There was a further colloquy with a reference by the Court to what had occurred on Feb. 8, 1963 and then the Court said:

"Now with that record, the only thing left is to find out how much you owe the plaintiff and to strike your counter-claim. You cited some cases here which just are not in point. One in this circuit, *Gill vs. Stollow*, 250 F.2d 669, an opinion given in 1957, and in the very last part of the second sentence, which you have quoted here there is this language, '... and general principles cannot justify the denial of a party's fair play in court except upon a serious showing of wilful default.'

"I think this record is clear that this is a wilful deliberate default, and you said you'd take it after advis-

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ing your client. You say it is a result of a business judgment arrived at by your client. And you say you are doing this because you want to quickly review the correctness of my opinion denying your motion to dismiss the complaint.

"Secondly, in the case of *Bernat vs. Pennsylvania RR.* they say, 'In a case where the refusal to produce a document makes it impossible for the plaintiff to prepare or present his case, a default judgment would be the proper remedy.' In that case the statement given by a plaintiff to an insurance company investigating an accident is not comparable to the production of Mr. Hughes in this case, who, I think, is the motivating factor of everything that went on during the times alleged in the complaint. So I am completely unpersuaded. I see no reason to continue the hearing, Mr. Davis, unless there is anything more you have to say than is embraced in this document you handed me after six weeks of effort.

"I will direct that a default judgment be entered, that the matter be referred to the Special Master forthwith for a hearing on the amount of damages. You can arrange with the Special Master for the dates to proceed with that. I will retain the jurisdiction and determination of the issue of divestiture. The counter-claims will be stricken and judgment entered for the additional defendants, and I will enter a formal opinion tomorrow to that effect. (Tr. pp. 10-11)

The formal opinion and order of May 3, 1963 is recorded in 32 Federal Rules Decisions 604.

The default having been entered for the reasons indicated above, the question remains as to its effect. The default is an admission implied by law as a result of the default, which thereupon dispenses with any proof of the facts alleged in the complaint, except as to unliquidated damages. The

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default not only has the legal effect of an admission of the allegations, but precludes any showing of defensive matters in regard thereto except as to damages. When the damages are not liquidated, there is no admission as to the damages by reason of the default, and proof thereof is required. (See 3 Freeman, Law of Judgments, Secs. 1281-1282, pp. 2662-2664 (Tuttle's Ed. 1925).)

The defendants have raised the issue of the legal sufficiency of the complaint prior to this hearing, and the complaint has been held to be legally sufficient by both Judge Metzner and the Court of Appeals. In this regard, Judge Metzner in his opinion denying Toolco's motion to dismiss held:

"Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under Rule 12(b)(6)." (214 F. Supp. at 108)

The Court of Appeals in rejecting a like argument stated:

"The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of anti trust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the anti trust laws. We do not agree." (332 F.2d at 610-611)

The Court of Appeals also said in this regard:

"We are satisfied that the complaint sufficiently states a cause of action and establishes the District Court's jurisdiction." (332 F.2d at 611)

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It has been argued by the defendants that even though the courts have held that the complaint is legally sufficient and that it states a cause of action the Special Master must determine again that a cause of action has been established in the process of fixing the amount of damages. They urge that there is a difference between a complaint under the Civil Rules of Procedure in the Federal Courts, because of the nature of notice pleading and a claim for relief which is denominated a "cause of action".

Such contentions have been rejected by the federal courts. The courts have recognized that notice pleading has been substituted in the federal court system for the former requirement that the complaint state a cause of action. Thus it is established law that if the pleading presents a prima facie case which satisfies the requirements of the rules as sufficient, that is all that is required. See *Nagler vs. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) pp. 324, 326. The essential requirement under the Rules is that the pleader show in the complaint that he is entitled to relief. 2, Moore's Federal Practice, Sec. 8.13, pp. 1704-05 and Sec. 2.05 (2), p. 359. See also *Conley vs. Gibson*, 355 U.S. 41, p. 47 where the court said:

"The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' (Reciting Rule VIII (a) (2)) that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it

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rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the sample guide of Rule VIII (f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioner's complaint adequately set forth a claim and gave the respondents fair notice of its basis."

And also in *Radovich vs. National Football League*, 352 U.S. 445 where the court said:

"Furthermore, Congress itself has placed the private anti trust litigant in a most favorable position through the enactment of Section V of the Clayton Act. *Emich Motors Corp., The General Motors Corp.*, 340 U.S. 558 (1951). In the face of such a policy this court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

See also *U.S. vs. Employment Plasterers Assn.*, 347 U.S. at p. 188, where the court considered the consequences where the complaint charged several times that the effect of all of the local restraints alleged was to restrain interstate commerce. In noting that the lower court had held that there were no allegations of fact showing this and therefore the complaint was insufficient the court said:

"Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader,' we hold that they must be taken into account in deciding whether the government is entitled to have its case tried."

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See also the like effect, *U.S. vs. Employing Lathers Assn.*, 347 U.S. 198.

All parties agree that *Thomson vs. Wooster*, 114 U.S. 104 (1885) is the leading case by the Supreme Court of the United States on the effect of a default. It is recognized in that decision that upon the entry of a decree *pro confesso* all matters alleged with sufficient certainty are admitted. However, it is as to those matters not adequately alleged with regard to certainty, or subjects which from their nature and the course of the court proceedings require an examination of details imposing an obligation on the complainant to furnish proof, that differences arise.

As stated by the defendants, the plaintiff is entitled to having findings "according to what is proper to be decreed" but that also includes the right to the legal benefits proceeding from the default. *U.S. vs. Fong*, 182 F. Supp. 446 (N.D.Cal. 1959), 300 F.2d 400 (9th Cir. 1962), *Cert. Denied*, 370 U.S. 938 (1962) is instructive regarding the handling of a damage proceeding after a default. It must be remembered, however, that in that action the court did not determine whether the four counts of the complaint each stated a cause of action, until the hearing on damages. It expressly reserved that question to be determined at the later date. It then decided that the first three counts did not state claims upon which relief could be granted and it also held that the fourth count could not borrow from the other counts to make up any deficiencies in that count. The fact that in this proceeding the plaintiff has already obtained a ruling that its complaint is legally sufficient under the law is an important distinction.

While conclusions of law are for the court in the determination of any judgment to be awarded and it thus decides

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whether the damages proved did in fact flow from the violations of law alleged, the defendants after their default no longer have the right to contest whether the asserted violations did in fact occur. They are limited to pointing out such information or evidence as may be in the record where the court should take judicial notice of records or facts which show that the allegations could not be true.

When the plaintiff has pleaded a "statement of claim" showing that he is entitled to relief (F.R.C.P. Rule VIII (a)), he may yet be unable to prove the case alleged. But that is not a problem in a default where the allegations are, in legal effect, admitted. Defaulting defendants are allowed to raise questions as to allegations contrary to judicially known facts because when a pleader states matter as facts which is out of harmony with that which the court judicially knows, such averments in the pleading are disregarded. *Greeson vs. Imperial Irrigation District*, 59 F.2d 529 (9th Cir. 1932); *Interstate Natural Gas Company vs. Southern California Gas Company*, 209 F.2d 380 (9th Cir. 1953). See also *In Re: Woodmar Realty Company*, 294 F.2d 785 (7th Cir. 1961), *Cert. Denied*, 369 U.S. 803 (1962) and *Glen Coal Company vs. Dickenson Fuel Company*, 72 F.2d 885 (4th Cir. 1934).

Pioche Mines Consolidated, Inc. vs. Dolman, 333 F.2d 257 (9th Cir. 1964) while a Rule 37 default case, did not allow the defendant to contest the allegations of the complaint. It did permit the defendant to dispute ownership in the damage hearing because the plaintiff was required to identify the corporate assets involved in the alleged diversion by the defendant. The court applied the rule which should be given effect here that the plaintiff was to be given the benefit of all reasonable inferences from the evidence tendered.

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Thus, at this stage of the case, the court is obligated to arrive at a judgment and that judgment must be just. Therefore, whenever a court would take judicial notice of the proceedings of public bodies such as the Civil Aeronautics Board or other Federal commissions or the files of the court or any similar matters and such records and information would satisfy the court that any allegation of the complaint or any part of an allegation could not be true, the court is not required by reason of the default to accept such allegation, or such part of it.

The effect of information appearing in the record up to this date, or as hereafter developed, bearing upon the truth of the allegations of the complaint, is somewhat different. Where such evidence clearly shows that the allegation or part of an allegation could not possibly be true, the court will not stultify itself by accepting such allegation or part of it in the face of such evidence. Where, however, the evidence merely may tend to show that the allegation may not be maintained and the defendants by reason of the nature of their default have materially interfered with the plaintiff's ability to produce evidence which might support the allegation or disprove such record evidence, the court is not required to reject the allegations. Such a result would reward the defendants for their interference with the processes of the court.

For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained. That opportunity was given up by their decision to default. The rights of plaintiff resulting from the default should not be taken away by any refinements and legalistic reasoning or any

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considerations that do not reach to the level of necessary and proper requirements for a fair and just hearing on the question of damages.

On the other hand, it should not be forgotten that the court in entering a judgment of default is performing "a judicial act". *Pope vs. United States*, 323 U.S. 1. Furthermore, Rule 55(b) (2) under which the court directed that this hearing be held recognizes that such is the nature of the responsibility, at this point in the default proceeding, by stating:

"If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as to it seems necessary and proper . . ."

It is within the framework described that the Special Master must proceed. Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint. Therefore, in the belief that the damage portion of the trial will be advanced by his doing so, the Special Master has sustained a considerable portion of the plaintiff's motion and has adopted certain findings requested, but only on an interim basis, for the purposes of the hearings on damages. He is reserving the right, however, before such hearings are closed to modify any or all of said interim findings if he finds it desirable or necessary

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dated July 30, 1965*

in order that justice may be promoted in this case. The Special Master has also declined to adopt certain interim findings proposed in the motion. The findings adopted are set forth in Exhibit AA attached to this opinion and order and made a part hereof as fully as if set out herein.

The failure to adopt, at this time, any proposed finding is not a determination by the Special Master that such finding is false, or disproved, or that it will not be fully established by the close of the hearings on damages. Such proposed findings have not been adopted at this time because in each instance they appear directly or indirectly to have a bearing upon the question of damages, and may be affected either partially or wholly by the evidence which is adduced in proof of damages herein.

The failure to now adopt such proposed interim findings, is not to be construed as placing such findings at issue, except to the limited extent that there is any information of which a court would take judicial notice, or there is evidence in the record which would prove such findings to be false or there may be evidence properly adduced as a part of these hearings on damages which would establish such findings to be false and is brought to the attention of the Special Master before the hearings close. The defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default.

The plaintiff is given the right to renew its request for such additional findings before the close of the evidence on damages.

Dated: New York, New York
July 30, 1965

J. LEE RANKIN,
Special Master

A-374

EXHIBIT AA

Interim and Tentative Findings of Fact

[CAPTION]

61 Civ. 2324

Before Hon J. LEE RANKIN, Special Master

*Exhibit AA**Interim and Tentative Findings of Fact***CONTENTS**

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Exhibit AA

Interim and Tentative Findings of Fact

[CAPTION]

61 Civ. 2324

Before HON J. LEE RANKIN, Special Master

Upon the complaint, the opinion and order of the United States District Court, Southern District of New York per Hon. Charles M. Metzner, U.S.D.J., dated May 3, 1963, the motion of TWA dated May 10, 1965 and all prior proceedings had herein, the following interim and tentative findings of fact are hereby adopted.

For convenient reference, the paragraph numbers of the complaint have been retained in these interim and tentative findings.

I. Nature of Claims and Jurisdiction of Court

1. (a) The complaint was filed and this action instituted against defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26 (1958)) in order (with respect to plaintiff's "First Claim") to declare, to prevent and restrain, and to recover damages resulting from, the alleged violation by defendants, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15

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Interim and Tentative Findings of Fact

U.S.C. § 11 (1958)), and of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. (1946 Ed.) § 18).

(b) Plaintiff's "Second Claim" arises from the alleged violations by the defendants of Sections 1 and 2 of the Sherman Act. In all other respects, the nature of the claim, the jurisdiction of the Court and the descriptions of the parties and of the commerce involved are as hereinbefore and hereinafter detailed in Findings 1 through 8 hereof with respect to plaintiff's "First Claim".

(c) Plaintiff's "Third Claim" arises out of the facts alleged in support of the first two claims, and invokes the Court's pendent jurisdiction.

II. Identity of Parties

2. (a) Plaintiff Trans World Airlines, Inc. (hereinafter sometimes called "TWA") is a corporation organized in 1934 and existing under the laws of the State of Delaware and maintains its principal executive offices in the City of New York.

(b) TWA is the only air carrier authorized under Certificates of Public Convenience and Necessity granted by the Civil Aeronautics Board to provide both transcontinental and transatlantic scheduled air transportation in the interstate and foreign commerce of the United States, and during the times referred to in the complaint was and is now providing such transportation, in competition at various points with various other United States-Flag and foreign-flag air carriers.

*Exhibit AA**Interim and Tentative Findings of Fact*

3. (a) Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") at all times referred to in the complaint was and is a corporation organized and existing under the laws of the State of Delaware, had at the time the complaint was filed, assets of several hundred million dollars and transacts business within the Southern District of New York.

(b) Toolco was and is engaged in interstate commerce, *inter alia*, since in or about 1939 in the acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") throughout the period of the matters complained of, was and is the sole stockholder of Toolco and has directed, controlled and dominated its activities. Until approximately December 30, 1960 he was an officer of Toolco.

5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and at the time of the filing of the complaint was a director of TWA.

6. (a) Atlas Corporation (hereinafter called "Atlas") is a corporation organized in 1936 and existing under the laws of the State of Delaware. While it is designated in the complaint as a co-conspirator, it is not a defendant.

(b) Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an air carrier engaged in the

*Exhibit AA**Interim and Tentative Findings of Fact*

business of providing scheduled air transportation in interstate commerce. At the time the complaint was filed in this action Northeast was controlled by Atlas, by means, *inter alia*, of the ownership by Atlas of 58% of the stock of Northeast.

(c) At the time the complaint was filed, the defendant Hughes for some years past had had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

III. *The Commerce Involved*

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. §1301.

(b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities

Exhibit AA***Interim and Tentative Findings of Fact***

between which in each instance TWA provides more than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance TWA provides the only scheduled air transportation provided by United States-Flag air carriers.

(f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States.

8. The nature and extent of such trade and commerce with respect to TWA is more fully described as follows:

(a) TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States. The scheduled air transportation provided by TWA in the United States has been and is a substantial proportion of that provided by all air carriers within the United States. During the periods set forth below, TWA provided the percentages set forth below of all scheduled passenger miles provided by all domestic scheduled trunk air carriers within the United States:

Year 1955	.....	14.9%
Year 1956	.....	15.1%
Year 1957	.....	14.9%
Year 1958	.....	15.0%
Year 1959	.....	15.3%
Year 1960	.....	15.2%

*Exhibit AA**Interim and Tentative Findings of Fact*

(b) Since 1946, TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia. The scheduled air transportation provided by TWA between the United States and certain foreign cities has been and is a substantial proportion of that provided by all United States-Flag air carriers and of that provided by all air carriers. During the periods set forth below, TWA provided the percentages set forth below of all passenger miles provided by scheduled United States-Flag air carriers between the United States and foreign cities:

	% of U.S. Flag
Year 1955	13.6%
Year 1956	12.9%
Year 1957	12.0%
Year 1958	12.5%
Year 1959	9.5%
Year 1960	12.5%

(c) In its operations, TWA has used, and is using, both in its domestic operations and in its international operations, a substantial proportion of all of the aircraft, both jet-powered and otherwise, operated by all scheduled air carriers operating within the United States, by all of the United States-Flag scheduled air carriers operating between the United States and foreign cities and by all of the scheduled air carriers operating between the United States and foreign cities.

(d) TWA provides and has provided a substantial proportion of the scheduled transportation in jet-powered aircraft provided by all carriers within the United States, by all United States-Flag air carriers between the United States and foreign cities and by all air carriers between the United States and foreign cities. In 1959, TWA provided over 1.1 billion passenger miles of scheduled jet air transportation.

*Exhibit AA**Interim and Tentative Findings of Fact*

(e) The requirements of TWA for commercial jet-powered aircraft constitute and have constituted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia*, of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA.

(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. For example, during the period 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of \$100,000,000, which aircraft were manufactured by manufacturers in various states of the United States.

(g) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial jet-powered aircraft, both long-range and otherwise, made by United States manufacturers. For example, TWA at the time the complaint herein was filed had more than \$150,000,000 worth of jet-powered aircraft on order.

(h) TWA constitutes and has constituted a dominant portion of a substantial market for aircraft, that is, the market for aircraft for use between certain pairs of United States cities and between the United States and certain foreign cities. In 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, such transportation amounting to 332,000,000 passenger miles accommodating 391,000 passengers and accounting for approximately 7.8% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 90% and 100% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 680,000,000 passenger miles accommodating

*Exhibit AA**Interim and Tentative Findings of Fact*

over 1,000,000 passengers and accounting for approximately 16.0% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 80% and 90% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 331,000,000 passenger miles accommodating 659,000 passengers and accounting for approximately 7.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 70% and 80% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 417,000,000 passenger miles accommodating 412,000 passengers and accounting for approximately 9.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 60% and 70% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 218,000,000 passenger miles accommodating 251,000 passengers and accounting for 5.1% of the domestic passenger miles provided by TWA in 1959. Thus, in 1959, TWA provided more than 60% of the passenger miles between certain pairs of United States cities, such transportation by TWA amounting to almost 2 billion passenger miles accommodating more than 2.7 million passengers and accounting for 46.5% of the domestic passenger miles provided by TWA in 1959. TWA is the only United States-Flag air carrier which is now authorized to provide scheduled air transportation of passengers between the United States and any of the following cities: Athens, Geneva, Zurich, Milan, Algiers, Tunis, Cairo, Tel Aviv, Dahrhan, Bombay and Colombo. Long-range aircraft are used by TWA between the United States and the above-named foreign cities; all other aircraft used by TWA are usable between one or more

*Exhibit AA**Interim and Tentative Findings of Fact*

of the pairs of United States cities between which TWA provides the only scheduled air transportation. TWA in 1959 provided the following percentages of the scheduled air transportation measured by number of transatlantic passengers provided by all air carriers between the United States and the three principal ports of entry (London, Paris and Lisbon) into Europe, Africa and Southwest Asia: United States-London, 11%; United States-Paris, 17%; United States-Lisbon, 32%.

(i) In 1960, operating revenues of TWA were substantially in excess of \$300,000,000; net income was in excess of \$6,000,000. During the first quarter of 1961, TWA had an operating loss of approximately \$13,000,000 and a net loss of approximately \$9,000,000.

IV. The Offenses Charged

9. Beginning in or about the year 1939 and continuing at least up to and including the date of the filing of the complaint, the defendants, and other persons acting for each of them were engaged in:

- (a) A combination and conspiracy to restrain interstate and foreign commerce of the United States;
- (b) A combination to restrain interstate and foreign commerce of the United States by providing financing of the acquisition by TWA of aircraft, including jet-powered aircraft, only upon the condition that TWA acquire all such aircraft from defendant Toolco;
- (c) A combination to restrain interstate and foreign commerce of the United States by requiring TWA to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco;

*Exhibit AA**Interim and Tentative Findings of Fact*

- (d) A combination and conspiracy to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States;
- (e) An attempt to monopolize a substantial segment of the interstate and foreign trade and commerce of the United States;
- (f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessee; and
- (g) Acquisitions of the stock of a corporation.

V. Acts Committed Prior to December, 1960

10. (a) Commencing in or about 1939 and at various times thereafter, Toolco, pursuant to an understanding with and at the direction of Hughes, acquired common stock of TWA.

(b) As a result of these acquisitions, Toolco acquired more than 78% of TWA's common stock.

11. Since in or about 1955 one of the most important single factors in the operation of and competition among air carriers engaged in air transportation in interstate and foreign commerce has been the prospect, introduction and eventual utilization of jet-powered aircraft.

12. (a) By 1955, aircraft manufacturers (including Boeing Company, hereinafter called "Boeing", and Douglas Aircraft Company, Inc., hereinafter called "Douglas") had prepared—to the general knowledge of the air carrier industry—plans and drawings and otherwise had under-

*Exhibit AA**Interim and Tentative Findings of Fact*

taken preparations for the manufacture by themselves of jet-powered aircraft intended for use by air carriers.

(b) Beginning in or about 1955, many air carriers devoted substantial efforts of their own (i) to determining whether the jet-powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them in their respective operations, and (ii) to obtaining jet-powered aircraft suitable for their needs, including the participation by them in the design of such aircraft.

(c) Boeing and Douglas each contemplated the manufacture of and did ultimately manufacture jet-powered aircraft for short-range flights and for medium and long-range flights suitable for the respective needs of such air carriers.

13. (a) In or about October, 1955, at approximately the time of the decision to abandon the Model 18, the first firm order for jet-powered aircraft was placed with a United States-aircraft manufacturer by a United States-Flag air carrier; that order was placed with Boeing by Pan American World Airways, Inc., TWA's principal international competitor.

(b) In the ensuing month and a half, principal United States and foreign air carriers—including major competitors of TWA—placed orders for jet-powered aircraft with Boeing and Douglas. These air carriers ordered 59 jet-powered aircraft from Boeing and 95 jet-powered aircraft from Douglas, which orders were scheduled for delivery in 1959 and 1960.

14. (a) During this period when other United States-Flag air carriers were placing orders for jet-powered aircraft, and thereafter, the defendants caused and directed

*Exhibit AA**Interim and Tentative Findings of Fact*

TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft.

(b) In or about February, 1956, the defendants arranged for Toolco to place orders for 15 jet-powered aircraft with Boeing.

(c) Thereafter, the defendants arranged for Toolco to place orders with Boeing for an additional 18 jet-powered aircraft.

(d) In or about April, 1956, the defendants arranged for Toolco to place orders for at least 30 Model 880 jet-powered aircraft to be manufactured by Convair.

15. (a) The purchase orders placed by Toolco with Convair and Boeing reserved to Toolco the privilege of assigning to TWA the right to acquire the jet-powered aircraft so purchased.

(b) Despite repeated requests by TWA, Toolco refused throughout the period 1956 to 1960 to assign to TWA the rights to acquire such aircraft.

16. (a) During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco.

17. (a) During the years 1959 and 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis.

(b) These leased aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960.

Exhibit AA

Interim and Tentative Findings of Fact

(c) The number of aircraft so leased to TWA by Toolco was inadequate to the needs of TWA.

18. Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the East Coast of the United States and Canada. In 1959 Northeast's revenue passenger miles totaled 519,000,000 and its total assets exceeded \$35,000,000.

19. (a) In November, 1960, while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six Convair Model 880 jet aircraft which Toolco had on order from Convair.

(b) Among the six Convair jet aircraft leased to Northeast were three which had previously been assigned to TWA by Toolco in an agreement dated May 9, 1960.

20. (a) Instead of allowing equity financing by TWA the defendants caused TWA to obtain funds chiefly by means of debt financing.

(b) As a result TWA was rendered unable to seek needed financing for the acquisition of aircraft except upon the approval of defendants.

(c) The defendants' conduct rendered TWA dependent upon them for such assistance in financing as defendants might choose to provide.

21. (a) From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants.

*Exhibit AA**Interim and Tentative Findings of Fact*

(b) From 1955 until December, 1960, the defendants used their power over TWA's acquisition of aircraft to compel TWA to obtain financing for aircraft acquisitions of the type and in the manner dictated by defendants.

22. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

23. Despite this, the defendants in 1955 and continuously thereafter until December, 1960, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft which TWA required for its needs.

24. (a) Commencing in 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft.

(b) In 1955 and 1956 various U.S. air carriers were able to obtain funds at a cost (or interest rate per annum) of 4% in 1955 and costs ranging from $4\frac{1}{4}\%$ to $4\frac{3}{4}\%$ in 1956.

25. (a) Although, in 1955 and thereafter, the defendants discussed with others various proposals for the financing of jet aircraft they failed to make arrangements for such financing and refused to allow TWA to make any such arrangements for itself until December, 1960.

(b) By December, 1960 the prevailing cost of funds for debt financing had risen to $6\frac{1}{2}\%$.

*Exhibit AA**Interim and Tentative Findings of Fact***VI. THE FINANCING AND ACQUISITION OF JET AIRCRAFT
BY TWA IN AND SINCE DECEMBER, 1960**

26. In connection with TWA's acquisition from Toolco in December, 1960 of certain jet-powered aircraft and the rights to obtain certain additional jet-powered aircraft from Boeing and Convair and in connection with other financial transactions between TWA and Toolco, TWA delivered to Toolco a note dated December 30, 1960 for \$100,000,000, carrying an interest rate of 6½%, which note was subordinated to the indebtedness of TWA to various banks and insurance companies for additional funds needed by TWA for the purchase of these aircraft.

27. As part of the arrangements with Toolco above described, TWA agreed to offer to its stockholders not less than \$100,000,000 of its subordinated income debentures, with attached warrants to purchase common stock of TWA; the debentures were subordinated to TWA's senior indebtedness to banks and insurance companies. Toolco agreed to purchase, not later than three business days after expiration of the subscription offer, a principal amount thereof equal to the excess of \$100,000,000 over the principal amount purchased by others in the offering; Toolco also was given the option to purchase, not later than three business days after the expiration of the subscription offer, all or any part of the debentures not purchased by stockholders pursuant to the subscription offer.

28. (a) As part of the arrangements with Toolco and with banks and insurance companies as above described, Toolco, TWA and three Voting Trustees (Ernest R. Breech,

Exhibit AA

Interim and Tentative Findings of Fact

Irving S. Olds and defendant Holliday) executed an agreement dated as of December 15, 1960.

(b) The agreement provided that the TWA stock owned and to be owned by Toolco would be placed in a Voting Trust, pursuant to which the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies.

29. The creation of the Voting Trust above described was required by the financial institutions as a condition to making loans to TWA of \$165,000,000 also needed for the purchase of the aforesaid aircraft, and which loans were evidenced by a like amount of senior notes of TWA.

30. The Voting Trust, in which Toolco's TWA stock has been deposited pursuant to the terms of the Voting Trust, provides in Article Thirteenth thereof that it shall terminate on December 15, 1970, unless previously terminated or extended as provided therein.

31. Thereafter and in early 1961, at a meeting of stockholders of TWA, the Voting Trustees, by majority vote, and other stockholders of TWA entitled to vote duly elected a Board of Directors of TWA and said Board of Directors elected a new President of TWA.

32. (a) In March, 1961, after careful consideration of TWA's requirements for additional jet-powered aircraft, the officers of TWA who were concerned with such matters unanimously recommended to the Board of Directors of

*Exhibit AA**Interim and Tentative Findings of Fact*

TWA that TWA's immediate needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B.

(b) The Board of Directors of TWA authorized the purchase of these aircraft.

(c) On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately \$187,500,000.

(d) Of this amount, TWA expected to provide approximately \$40,500,000 from its own funds and to borrow \$147,000,000. At the time the complaint was filed the borrowing was being negotiated with certain insurance companies and banks..

VII. ACTS COMMITTED SUBSEQUENT TO 1960

33. (a) In and after May, 1961, the defendants insistently demanded of TWA that it not purchase the Boeing aircraft but instead purchase from Toolco 13 Convair Model 990 aircraft which Toolco had agreed to purchase from Convair.

(b) Defendants made these demands despite the knowledge that the Board of Directors of TWA had decided that the Convair aircraft were not as suitable for TWA's needs as the Boeing aircraft.

34. Defendants also sent telegrams and other urgent messages to TWA, threatening TWA, its directors, the Voting Trustees and the financial institutions lending money to TWA with litigation against TWA, its manage-

Exhibit AA***Interim and Tentative Findings of Fact***

ment, its directors and the Voting Trustees unless TWA purchased the Convair aircraft from Toolco.

35. The agreements made in December, 1960, relating to the financing of TWA's purchase of jet aircraft, required, among other things, that TWA make, not later than May 31, 1961, a public offering of rights to purchase its subordinated income debentures with common stock warrants. In accordance with the provisions of those agreements, the Board of Directors of TWA approved the filing with the Securities and Exchange Commission of a Registration Statement relating to the proposed public offering and such Registration Statement was filed with the Securities and Exchange Commission on March 30, 1961.

36. (a) TWA, in order to comply with its obligation to make the proposed public offering prior to May 31, 1961 as agreed, requested the Securities and Exchange Commission to accelerate the effective date of the Registration Statement to May 18, 1961.

(b) Thereupon defendants filed objections with the Securities and Exchange Commission to the request of TWA and demanded that the proposed offering be deferred on the ground, among others, that Toolco had decided for the first time on May 10, 1961 to make a public distribution of the debentures which were being offered by TWA and which were to be acquired by Toolco pursuant to the provisions of the prior agreements.

37. Defendants further demanded that certain amendments be made to the Registration Statement in order to set forth, among other things, certain contentions of defend-

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ants then made for the first time by defendants, including, among others:

(a) that notwithstanding the admitted legal power of the Voting Trustees to act, the Voting Trust could not be given effect according to its terms so as to enable TWA to be operated independently of the wishes of the defendants;

(b) that Toolco's position was that it had been compelled to enter into the Voting Trust under conditions which would warrant an immediate termination of the Voting Trust;

(c) that Toolco was considering an attempt to enjoin the consummation of the Boeing purchase transaction above described or taking action for damages against the persons responsible for the Boeing agreements; and

(d) that there might be some basis upon which Toolco could assert an equitable right to sell to TWA the Convair aircraft previously ordered by Toolco.

38. After considering the contentions so advanced by defendants, the Securities and Exchange Commission accelerated the effective date of the Registration Statement, as amended, so as to make the Registration Statement effective on May 24, 1961.

39. After the effective date of the Registration Statement and while the public offering was in progress, the defendants publicly announced that they proposed to sell up to 85% of the rights to purchase subordinated debentures which defendants were obligated to acquire under the terms of the aforesaid agreements.

Exhibit AA

Interim and Tentative Findings of Fact

40. Defendants warned the insurance companies and banks from which TWA was then attempting to arrange the immediate borrowing of \$30,000,000 of short-term funds and the borrowing of \$147,000,000 of secured funds required for the purchase of the Boeing aircraft that the Voting Trust was invalid and that any such financing by them would be invalid.

Dated: New York, New York
July 30, 1965

J. LEE RANKIN
J. Lee Rankin,
Special Master

**Opinion and Order of Judge Metzner,
Dated November 16, 1965**

[Doc. 487]

[CAPTION]

61 Civ. 2324

METZNER, D. J.:

Plaintiff seeks review of so much of an opinion and order of the Special Master as fails to adopt some of the proposed interim findings of fact requested by the plaintiff.

It is unnecessary to detail the long, drawn-out history of this complicated antitrust litigation. The present problem arose after the court directed the entry of a judgment by default pursuant to Fed. R. Civ. P. 37(b)(2)(iii) and 37, and appointed a Special Master pursuant to rule 55(b)(2) to determine the amount of damages.

The plaintiff, in an attempt to facilitate the hearings before the Special Master, submitted proposed interim findings of fact to formalize the basic findings which it considered flowed from the default. The plaintiff disagrees with some of the views expressed by the Special Master in his opinion and with so much of his order striking portions of the proposed findings.

In the main I agree with the exposition by the Special Master of the law and procedures to be followed by him in assessing the damages in this case. There appears to be some ambiguity in one portion of his opinion which may need clarification.

He states that:

"For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained."

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The opinion goes on to state:

"Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused . . ."

The reference to a duty "to be satisfied of the liability of the defendants" may, in light of the first quotation above, indicate a conflict in approach, although a reading of the entire opinion does not warrant such a conclusion.

The order referring this matter to the Special Master pursuant to the authority of Fed. R. Civ. P. 55(b)(2) was intended to embrace this portion of the rule:

"If, in order to enable the court to enter judgment . . . it is necessary to . . . determine the amount of damages . . . the court may . . . order such references as it deems necessary and proper".

Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 602 (2d Cir. 1964), *writ of cert. dismissed*, 380 U.S. 248 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. *Thomson v. Wooster*, 114 U.S. 104 (1885).

Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in the complaint (*Thomson v. Wooster, supra*); or where they are contrary to facts of which the court will take judicial notice (*Glenn*

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Coal Co. v. Dickinson Fuel Co., 72 F.2d 885, 889 (4th Cir. 1934)); or where they are not susceptible of proof by legitimate evidence (*Cohen v. United States*, 129 F.2d 733 (8th Cir. 1942), *Greeson v. Imperial Irr. Dist.*, 59 F.2d 529 (9th Cir. 1932)); or where they are contrary to uncontroverted material in the file of the case (*Interstate Nat. Gas Co. v. Southern Calif. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953), *In re Woodmar Realty Co.*, 294 F.2d 785 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962)). However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.

Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted.

The Special Master stated that the failure to adopt any proposed finding is not a determination that such finding

"is false, or disproved, or that it will not be fully established by the close of the hearings on damages."

*Opinion and Order of Judge Metzner,
dated November 16 1965*

Such proposed findings are not at issue except to the limited extent noted above. The Special Master specifically stated that

“the defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default.”

The matter is returned to the Special Master to proceed in accordance with these views. So ordered.

Dated: New York, N. Y.

November 16, 1965

CHARLES M. METZNER
U. S. D. J.

[The above opinion also appears at 38 F.R.D. 499]

**Transcript of Hearing Before Judge Metzner on
December 30, 1965**

[Doc. 498]

[CAPTION]

New York, December 30, 1965;
11:30 o'clock a.m.

[APPEARANCES]

The Court: It is your motion, Mr. Hayes.

I have read the papers so I am familiar with the seven inches that you have submitted on this motion. You may start.

Mr. Hayes: May it please the Court, I have prepared an outline of argument here which I finished last night after analyzing plaintiff's brief.

I would like to state a few basic considerations to begin with, and the first is that any judgment that is eventually entered here must be based on findings and conclusions of law, and those findings and conclusions must show that Toolco acted in violation of the antitrust laws, otherwise there can be no recovery.

Now, the complaint has been held to be sufficient on its face, and we are not challenging those holdings in this motion. I want to emphasize that.

When the Courts upheld both your Honor and the Court of Appeals, they accepted, as they were bound to accept, the allegations in Paragraph 3 of the complaint that Toolco was a manufacturer and supplier of aircraft to air carriers, including the plaintiff.

It also alleged that the acts of the defendants constituted restraints on competition among aircraft manufacturers.

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Those allegations were in the complaint and had to be accepted.

If, however, Toolco is not a manufacturer, not a supplier, and not in competition with aircraft manufacturers, it seems to me quite obvious that there can be no restraint of trade and no antitrust violation.

This very allegation in Paragraph 3 the plaintiff describes as a "keystone allegation," and we agree that it is a keystone allegation. Without it the arch collapses.

Another basic consideration is that by the default well-pleaded fact allegations are deemed admitted, and your Honor has set down the rules in your opinion of last month which bind the defendants with respect to the challenging of factual allegations.

The plaintiff says in its brief that "we do not attack any allegation as indefinite."

I can only conclude that the plaintiff did not read our brief very carefully because in the early part of it we point out the allegation that Toolco was a manufacturer and supplier of aircraft, and that it was indefinite and ambiguous because aircraft is defined in another paragraph of the complaint as including any device that could fly or that could be used in navigation in the air.

Now, if jet aircraft was not meant by that allegation, by the use of the word "aircraft" the allegation is meaningless. It could be, for example, similar to the situation of a suing parent which was engaged in the manufacture of motorcycles but which had a subsidiary which was engaged in car-rental hire, and which compelled its subsidiary to use only cars of General Motors manufacture, and to contend in the complaint, or to allege that the parent was a supplier of motor vehicles.

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Of course it was a supplier of motor vehicles, and both motorcycles and automobiles are motor vehicles, but they are not the same commodity by any means.

If, on the other hand, aircraft was intended to mean jets, our position is that the allegation is false and must be rejected, and we base the falsity and the rejection on the application of judicial notice in accordance, strictly we believe, within the limits set in your opinion, on public records and on the record in this case.

In Mr. Rummel's testimony, in the course of his deposition, Mr. Williams, who was present during that time, on behalf of the plaintiff, announced first that he didn't intend to cross-examine, and at the conclusion of the deposition he announced that he had no cross-examination.

It also appears from the deposition that from time to time Mr. Rummel reviewed the transcript and made sundry corrections in the transcript. Mr. Rummel is presently an officer of the plaintiff.

We submit that under Rule 26, therefore, the statements made then, if contradictory of or explanatory of any of the allegations of the complaint but be deemed to be admissions of the plaintiff.

As far as the public records are concerned, I was amused to find them referred to as a meaningless potpourri of the records. This springs from the plaintiff's obvious dislike of the concept of judicial notice of public records. They do not cite any case having to do with judicial notice. They seek to support their position with respect to the limit on the Court as to judicial notice by reference to Learned Hand's decision in the famous Evergreen case which has to do with collateral estoppel. It does not mention judicial notice.

Even without any special statute on this subject, the Court should notice the proceedings of an administrative

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body in the Federal Government, but here we have something else.

Section 1103 of the Federal Aviation Act specifically provides that all contracts, agreements, understandings and arrangements filed with the Board, and statistics, tables and figures contained in the annual report or other reports of air carriers shall be preserved as public records and shall be received as prima facie evidence of what they purport to be for the purpose of investigation by the Board and in all special proceedings.

You have a specific provision of the very statute on which we are relying, so that when we cite CAB records we are reciting prima facie evidence in a judicial proceeding.

To begin with, the indefiniteness that I mentioned with respect to the allegations of aircraft on any hearing that we held here, because of the very indefiniteness of the allegation, there will be a burden on the plaintiff to prove by evidence that it was jet aircraft that was being supplied by Toolco or manufactured by Toolco in competition with the aircraft manufacturers.

But here, with this default, and pursuant to the doctrine of judicial notice, this Court must accept prima facie that Toolco never sold or leased a plane to anyone other than TWA, which is, indeed, rather a strange dealership, when you consider the allegations in the complaint, because since 1939 they have been engaged in this conspiracy, and they have never sold a plane to anybody; they never leased a plane to anybody since 1939. A pretty unsuccessful dealership—except, of course, for TWA.

What we have done in our brief, or what we have attempted to do, was to present to your Honor in a very careful and in a very accurate way an analysis of the allegations of the complaint itself and of the fact which we submit

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the Court judicially knows from public records and from the depositions.

The plaintiff would sweep that all under the rug. The plaintiff begins with the assumption that Paragraph 3 is a well pleaded fact allegation.

Proceeding from that assumption, it also assumes that Toolco is a competitive factor in the aircraft industry.

Let me treat first with the legal propositions involved.

The plaintiff talks about a boycott. It cites the Radiant Burner's case and the Yellow Cab case. The Radiant Burner's case is a conspiracy action brought by a manufacturer of burners who is not a member of one of the associations. I think it was the American Gas Association, if I remember the name correctly. But it was a trade association made up of manufacturers of gas burners for public utilities, and they had adopted certain standards.

The plaintiff's gas burners were claimed, by the defendants, not to meet the standards. The action was decided on a complaint. The complaint alleged that the standards were not objective standards but were designed to exclude it as a competitor of the defendants from the market because one the defendants, or various of them, refused to supply gas into installations where the plaintiff's burners were installed.

Here we have a clear exclusion by a group of defendants of a competitor, one who was actually selling the same product in competition with what they were selling. They cite the Caloric case. I don't know why. The Caloric case is the famous linen rug case. In that case there was a legal monopoly enjoyed by the defendant. It had a series of distributorships around the United States which distributed the linen rugs. One of the distributors, if I remember right, was located in Chicago, and he decided one year that he would put in a bid to the United States Government. Prior

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to that none of the distributors had ever bid for government business, only the defendant had.

Wait, I am in the wrong case. I am sorry. I am terribly sorry. I got off on the wrong case, your Honor.

The Caloric case was the one having to do with Caloric Broadway Stores. I am sorry for that slip of memory, your Honor.

There a retailer was excluded by manufacturers from carrying the products which its competitors were allowed to carry. Again, there was an exclusion of it disenabling it to compete with its competitors.

Yellow Cab is perhaps the most interesting of all. Yellow Cab was obviously the case upon which this complaint was built. It is referred to constantly by the plaintiff in his brief.

Yellow Cab was a situation where the parent owned cab companies in 44 cities. It was also a manufacturer of cabs, selling cabs in competition with General Motors, Ford, Chrysler, what-have-you. It insisted that according to the—again, this was cited on the complaint—that its subsidiaries buy cabs only from it, from nobody else, but it was making cabs and selling them and its insistence constituted an exclusion by the parent of all other manufacturers of cabs, but there was a competitive aspect of it in each instance. In each one of these cases a competitor was excluded from the market.

There has not been a single case, there is not a single case cited in plaintiff's memorandum, which does not involve the denial of access to the market of a competitor—every single one of them without exception.

Plaintiff asserts that TWA was coerced from dealing with any supplier of aircraft or financing except Toolco. This statement in the brief goes beyond the allegations of the complaint, because it suggests that it also supplied financing.

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The complaint even does not say that. All the complaint says is that Toolco dictated the financing, not that it supplied it. But it assumes rather as well as claims that plaintiff did supply the aircraft. Again, they mention Yellow Cab. Yellow Cab has no application to our case unless Toolco was a manufacturer and supplier of aircraft in competition. That is the Yellow Cab case. It is not our case.

They mentioned National City Lines. That was a case where the National City Lines, a bus operating company or a holding company owning a bunch of bus operating companies, sought investments I think always in preferred stock, although I am not sure of that detail, but I think it was preferred stock, from manufacturers of buses, of tires, gas and oil and so on, making an agreement in each instance that the bus lines would buy the products of the various investors only from those investors, and each of the investors knew that such an agreement was being made by the parent with each of the other investors, and obviously each of them knowing of the agreement, the Court inferred a conspiracy, quite properly. But in each instance there were bus companies competitors with the investor, who were excluded, tire manufacturers who were excluded, gas and oil suppliers who were excluded and so on.

Section 3 is perhaps the strangest of all of the allegations here or the claims here. We are met with the statement in the brief that the applications to the CAB were filed at Toolco's direction. I don't know where plaintiff gets that. It is not in the complaint. It seems to us in ordinary common sense that if the condition alleged in the complaint existed, somebody in TWA should know about it. If it existed only in the mind of some executive of Toolco, it wasn't a condition; it had to be agreed to.

Now, the applications that were submitted to the CAB were signed by officers. One was signed by the president

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at the time. The other four set forth in our brief were signed by vice presidents.

Now, the plaintiff does not like these applications because they don't disclose any condition and thus deny the allegation of the complaint. And they are prima facie evidence.

Now, we must conclude from the position plaintiff is taking here that either the condition was not known to plaintiff's officers, in which event it wasn't a condition at all because it could not have been agreed to, or that these officers made misrepresentations to the CAB. We don't like to think that and we don't think it. We think we may rely on the CAB records as the prima facie evidence that they are under the statute.

Now, in every case plaintiff cites under Section 3, again there has been excluded a competitor who was prepared to sell the product, which the purchaser from the one imposing the condition had agreed to buy only from his seller. The Tires, Batteries, Accessories cases are the most common, where the oil company supplied gasoline and oil to the service stations on condition that they would buy either from it or directly from the supplier, in which event they usually got a rake-off of some kind, some sort of an override, on the tires and the batteries and the accessories that would be sold at the service station. And if they elected, for example, Goodyear tires and their deal was with Goodyear, Goodrich couldn't sell; General Tire couldn't sell; Seiberling couldn't. There was an exclusion of a competitor engaged in the sale of the very product which was tied.

But most interesting we think is the language the complaint uses. It doesn't use the statutory language. The language of the complaint is that the condition was that TWA would not purchase or lease from any other potential supplier. Now, that is really a masterpiece of vagueness. The assumption of course and the inference, or

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intended inference, are they are airplane manufacturers, and also that Toolco was a competitor of theirs. These are the inferences that the reader of the complaint is expected to draw.

What the Act says, however, is that the conditions be that the purchaser shall not use or deal in goods of the competitors of the lessor. Of course, plaintiff very well knew, even assuming that Toolco was a competitor of the manufacturers that TWA was using the goods of its competitors; they were using Boeing airplanes, they were using Convair airplanes, so they couldn't use the statutory language. So they invented this nice weasel wording to make it sound like Section 3 although it does not in fact read on Section 3.

So far as the monopolization claim is concerned, again they go back to Yellow Cab. I am not going to repeat Yellow Cab. Again I make only the point that Yellow Cab is meaningless unless the parent had competitors who were excluded.

Then we get down to the particular sections. It is interesting to note that Section 3 is disposing of it in a footnote. Plaintiff refrains from discussing it since it relates only to the prayer for injunctive relief, which your Honor has reserved to yourself. If that be so, I don't understand why the plaintiff was so aggrieved at the Master's failure to find, with respect to the second claim, the allegation that there was a violation of Section 7, because the Master had only damages in front of him. But I fully understand the plaintiff's failure to discuss Section 7.

First of all, there is your Honor's own opinion as to the depositions in which you held quite specifically there was an immunity bath with respect to the acquisition itself. Further, Section 7 deals only with acquisitions. Toolco's

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acquisition is immune from attack. It has no reference whatever to abusive control after acquisition.

Section 7 does not cover that, and finally, as your Honor has held and been followed by various other courts, no damages can flow from a violation of Section 7. So I fully understand the bashfulness of the plaintiff with respect to any discussion of Section 7.

Then we come to conspiracy. They complain that we complain that Atlas' acts are not shown in detail. We make no complaint. If they had some acts to allege, they could have alleged them.

All we pointed out is that the only allegations having to do with Atlas, aside from obviously wrong ones, that Atlas was engaged in acquisitions of stock, meaning TWA's stock, or that Atlas made sales on condition when Atlas does not sell anything having to do with airplanes. We point out that the only allegations in the complaint having to do with Atlas were a proposed merger, which was never consummated. It is a matter of history. The merger itself, as we have shown to your Honor—the merger agreement is only an agreement to merge—was subject to approval of the minority stockholders of plaintiff and of the CAB. If the CAB disapproved, it couldn't happen. If the CAB did approve, it would have to be on the basis that it was in the public interest and immunity would attach.

We fail to understand how an agreement to do something, which can't be accomplished without the approval of an administrative agency set up to administer the particular act involved and never consummated, can possibly constitute the parties to the agreement conspirators to violate the antitrust laws because Atlas is not alleged to have done anything else, taking every allegation of the complaint.

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So what we are left with is a corporate defendant and its officers, one of whom is the sole stockholder, to wit, Toolco, Hughes, Holliday. That is what is left.

The plaintiff seeks to meet this by references to various cases where conspiracies were held to exist among affiliated corporations. We all know that rule of law. Affiliated corporations may be conspirators, and I might point out that in every one of those cases—take, for example, Timkin. The parent and a subsidiary were all engaged in the same line of business. They were engaged in price-fixing or allocation of markets or what-have-you. They were separate corporate entities, and the courts have held that corporations, though related, may be parties to a conspiracy. But no court has ever held there is a conspiracy, civil conspiracy, in violation of the antitrust laws between a corporation and its own officers, and it couldn't. It would be ridiculous because the officers act for the corporation.

Plaintiff attempts to distinguish the Nelson Radio case as applying only to those acting in a corporate capacity, and suggests, without any facts whatsoever, although the complaint reeks with allegations, that this whole conspiracy was for the benefit of Toolco, that somehow or other Hughes had a separate independent capacity. No fact basis for this assertion of the plaintiff.

Concededly, the complaint alleges, and it is true, Hughes was the sole stockholder of Toolco, and he dominated it—no question about it. What is significant to us is that an identical situation was presented in the Goldman Theatres case, which we cite in our brief, a decision by the Third Circuit, where Goldman—I think it is the Goldlawr case as it appears in the books—where Goldman, like Hughes, was the 100 per cent stockholder, and the conspiracy was

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alleged to be between the corporation and himself and some other officers. The Third Circuit, relying on the Nelson case, said there could be no such conspiracy.

I would like to hear plaintiff's reply to the Goldlawr case.

But to get back, the whole legal discussion assumes, is based on the assumption, that Toolco is a competitor supplying jet aircraft to air carriers generally. They make the statement that we can't show this, this just isn't true. That is precisely what our brief does show. You must remember that the airlines of the United States operate in a fish bowl. The facts as to their operation are public knowledge. Their acquisitions are public knowledge.

For example, part of this meaningless potpourri that the plaintiff likes to dismiss are the Form 41 reports, which every airline must file. There is included an analysis of those reports in the papers before your Honor, and they show that Toolco never sold or leased a plane to anyone but the plaintiff.

Now, plaintiff does not discuss these Form 41 reports. It can't answer them. Impossible to answer them, so the best way is to forget about them and say you can't take judicial notice of them.

It is, indeed, a strange dealer in jet aircraft, an awfully strange competitor, who never sold or leased a plane in competition with the manufacturers whose trade is claimed to be restrained.

The record of the case shows that the planes were ordered to TWA configuration and specification; that TWA had representatives in the factories during their construction.

If we look at the complaint itself, we don't even find an allegation in the complaint of a factual nature other than the general allegation of paragraph 3, which I say is in-

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definite because of the use of the word "aircraft," that Toolco ever manufactured a jet plane or ever sold or leased a jet plane to anyone but TWA. Instead, we are treated to a series of 12 wholly unrelated instances set forth in the brief, and as the brief says, set forth in the brief to the Supreme Court.

Except for the so-called Boeing diversion and the Convair lease to Northeast, they deal with plans or intentions or negotiations—that is all they talk about—to deal with contracts by Toolco to buy planes, which, incidentally, never actually took place. The deals were never consummated.

One, however, does assert that Toolco actually supplied Vickers Viscount planes to Northeast. That is a flat allegation, a flat statement in the brief. It is not in the complaint. That statement is false. It is not sustained even by the documents which plaintiff cites. The record of the case shows that TWA seriously considered buying Vickers Viscounts back in, I think it was, 1957. The deal fell through because TWA decided that it didn't want Vickers Viscounts.

Hughes had apparently—and I am talking about what Mr. Rummel said—felt that he had a moral obligation to Vickers because he had apparently—apparently I say; you have to infer this from the testimony—apparently felt that he told them substantially in substance that TWA would buy the planes and TWA decided not to have them. So then he endeavored to find a purchaser for the planes, and Vickers sold them directly to Northeast, as is obvious from the Form 41 reports filed with the CAB. So the only allegation of a sale, the only suggestion of a sale in the 12 instances the public record again shows is false. Vickers planes were sold directly to Northeast. Toolco never owned them and never could have sold.

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Another one deals with the purchase of 300 airplane engines from Pratt & Whitney. It is clouded with mystery in plaintiff's brief. No mystery about it. There again, reference to Rummel's testimony shows that at the time the 300 engines were bought, Pratt & Whitney was about to have a price increase in February of 1956. Rummel advised or suggested or urged—I don't know what is exactly the right word to use—Mr. Hughes said it would be a good idea to buy the engines before there was a price increase. At that time, in February 1956, no one knew how many planes, jet planes, TWA was going to have eventually. But if they were to have 50, 300 was exactly the right number because these were engines that were used in Boeings, and for each plane, the Boeing having four engines, there are usually two spares, so it would have been precisely the right number for 50 Boeings.

Now, they had not been ordered at this time. I think only eight Boeings at this time had actually been ordered. There is no mystery about this.

Mr. Rummel also testified he thought it was pretty much the right amount. Now, it developed they didn't need them later because later Convairs were ordered and Convair uses the General Electric engine. So Hughes Tool Company found itself with excess engines and it sold them to Boeing, who purchased them from Toolco.

This complaint does not deal, however, with sales of engines. It deals with sales of aircraft. That is what the complaint alleges. So we are left with the so-called Pan Am diversion of the Northeast lease.

Under the contract with Boeing, Toolco could not assign its rights to anyone other than TWA without Boeing's consent. That was essential. Incidentally, the same thing is in the Convair contract. Boeing consented. Now, if there is anybody whose trade could possibly be claimed to be restrained here, Boeing consented.

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TWA did not need the extra planes or did not want them at the time, as we pointed out in a prior argument before your Honor. It got rid of them by having Pan American take over the contract, and incidentally, Pan Am also I believe bought some of those engines which were to go with the planes. The same is true of the Convair deal. Convair entered into agreement with the Hughes Tool Company whereby Hughes Tool Company was released on the purchase of the six planes.

Convair, the one whose trade is supposed to have been restrained, consented, and then it leased the planes to Northeast. So that even here we have no sale of a plane by Toolco to Pan Am or to Northeast. What we have is Toolco in one instance, with the consent of the manufacturer, disposing of its contract to Pan American, and the consent was necessary; and the other, the manufacturer and Toolco agreeing to release Toolco of the obligation, and the manufacturer releasing them.

Incidentally, I might mention in passing that it is perfectly apparent from the CAB control orders which we have presented to your Honor, that if Toolco ever did become or tried to become a supplier of aircraft, it would need CAB approval. But it never was, and it never sought the approval. It did once contemplate manufacture, which fell through in a few months. An application was made. It was later dismissed as moot because the plans were not carried through. But plaintiff tries to make a point here by saying in all these transactions, the engines, the Pan Am, the Northeast deal, Toolco made a profit.

As far as antitrust law is concerned, the only short answer to that is: So what? Take the engines, for example. They had bought them in February 1956, just before a price increase, and they sold them I think the middle of 1957

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sometime. They had no obligation to sell them at their cost. Boeing was perfectly willing to pay the price for them. Boeing was the one who wanted them, and they sold them to Boeing.

Talking about profits, the making of a profit does not make one an antitrust violator.

Now, the simple fact is, as we assert in our brief—and we assert it very carefully, your Honor, very carefully, and based on most objective evidence, and the plaintiff cannot deny the evidence—Toolco never competed with any aircraft manufacturer in the sale of planes to anybody.

You will pardon what must be now boresome repetition, but it sold and leased planes only to the plaintiff.

It is perfectly true it dominated the plaintiff's procurement policies and financing policies, but you can't build an antitrust violation on a parent's domination of its subsidiary. That is not Yellow Cab at all.

But now we have a coup de grace delivered in the brief. Toolco earned \$25 million by leasing planes to plaintiff. To say this is not a dealer is ridiculous in light of this. Plaintiff did not say that each of those leases, under which a total of \$25 million rent accumulated, were approved by the CAB, each and every one of them.

Plaintiff also does not deny what we state in the papers before you, that all but a very small part, a million or less of that \$25 million, was not paid to Toolco, the parent, until the financing was concluded at the end of December 1960. In short, Toolco took down the planes. With its own funds, it paid for the planes. It leased them to TWA. TWA operated them and paid no rent. Now, this is what a parent with a 78 per cent interest in a subsidiary would do. It is not what any dealer or supplier does.

As I said, there can be no judgment here without a finding that Toolco is a manufacturer in competition with a sup-

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plier. This Court simply cannot make such a finding on the basis of the facts known to it.

If I may paraphrase your Honor in a question you addressed to Mr. Sonnett back in September, we have presented here a complete existing record both from the depositions and from matters of public record, that the allegation of Paragraph 3, if it means jets, is false. That is what we have done. We have done it very carefully; we have done it very objectively.

On the facts now before it, this Court would look ridiculous if it found as a fact that Toolco is a manufacturer or a supplier of aircraft in competition with the manufacturers.

I stress Toolco is still in court. The default has not thrown it out of court.

The Court: Yes, but a very tenuous string, and Mr. Hayes, I am going to stop you because you have been going for forty-five minutes.

I have listened very carefully to you, and the only question going through my mind is why was there a default? Why didn't you go into court and get a judgment on the merits?

Just listening to you, I find you want to throw the default out and start over again.

Mr. Sonnett, I will hear you.

Mr. Sonnett: If it please the Court, we filed our brief yesterday, and you said you read our papers, and I take it that meant our brief.

The Court: Yes, I read it at 7:00 o'clock last night sitting right over there.

Mr. Sonnett: I have nothing to add to what is in our brief.

The Court: All right. Motion submitted.

*Transcript of Hearing Before Judge Metzner on
December 30, 1965*

Mr. Hayes: May I just answer your Honor's question?

The Court: Yes.

Mr. Hayes: This is not in the record, but it is well known.

The default took place because of the failure of Mr. Hughes to appear for a deposition primarily.

The Court: As a result of a deliberate business judgment.

Mr. Hayes: Right, correct.

Mr. Sonnett: With two other instances.

Mr. Hayes: Yes, I know. I said primarily. Everybody knows Mr. Hughes' passion for privacy, whether we like it or not.

The Court: Well, beyond that, Mr. Hayes, I offered in an off-the-record discussion to provide for protecting Mr. Hughes' passion for anonymity by having the deposition taken any place he wanted, as secret as he wanted it to be, and then I was asked not to publish it, so I never published it, but that is a fact.

Mr. Hayes: I am aware of this, your Honor.

All I can say, your Honor, is that this Court is under an obligation to render a just judgment despite the default.

The Court: The Court is going to render a just judgment, and however this Master finds the amount of damages to be, I will review it based on any exceptions you take to it. But all I am saying is that the burden of your argument as it hits me sitting here is that there has got to be a judgment for the defendant, and I wonder why you didn't try the case if there has to be judgment for the defendant.

Mr. Hayes: Your Honor, that is the burden of my argument. There is no question about it, and I submit that there should be a judgment for the defendant.

*Transcript of Hearing Before Judge Metzner on
December 30, 1965*

I submit that since on the facts now before the Court, it cannot be found as a fact that Toolco was competing with the manufacturers and suppliers under the well-pleaded allegation rule that you laid down, that the first order of business should be a determination as to whether or not that fact is true. That is the burden of our motion.

The Court: I understand it, but the way you put the motion is you turn the shoe around, and you say: We want a fact found, and you, Mr. Plaintiff, who are sitting there with a default judgment in your hand, must come forward and prove that this fact is false.

You are the one who is in default, Mr. Hayes, not the plaintiff.

Mr. Hayes: Correct.

The Court: They have a default judgment with everything that flows from it, and the burden is on you, within the narrow limitations of my order of November, to possibly have the Master find that certain facts do not exist.

But the way you place the motion: You come forward, Mr. Plaintiff; you prove; the burden is on you, Mr. Plaintiff, to prove that this is false.

It is a little difficult for me to accept that concept.

Mr. Hayes: I am sorry. Maybe I haven't made myself clear; maybe our brief didn't make it clear.

We submit that we have met the burden. We ask the Court now to make a finding of fact, based on the facts of record, and of which it must take judicial notice, of which it is bound as prima facie evidence, that Toolco is not a manufacturer or supplier.

The Court: Your proposed pre-hearing order asks me to order the plaintiff to come forward with the records and the facts which plaintiff contends preclude the entry of the following finding of fact, which of course is the finding of fact in your favor.

*Transcript of Hearing Before Judge Metzner on
December 30, 1965*

Mr. Hayes: I think we have met the burden, your Honor, by giving you prima facie evidence that the allegations were false.

The Court: I am afraid, Mr. Hayes, that this is going to have to go on before the Master within the order as I laid down in November, and you will produce evidence to him within the limitations of that order.

Mr. Sonnett: May I say one thing, Judge? I was, I think, very patient in listening to this rehash for forty-five or fifty minutes of what has been said before, and I don't like to be unpleasant at this season of the year, what with the holidays and everything, but—

The Court: Well, then, let's not be.

Mr. Sonnett: Yes.

But I don't think this Court needs to be protected by me or by Mr. Hayes. The Court of Appeals and the Supreme Court had no difficulty with this Court's decisions in this case, and I expect to hear Mr. Hayes making this same argument to the Supreme Court when this case gets back up there.

The Court: I have no doubt that you will be back up there again, with the way this is going, but I think that the Master's order, with my modification contained in the order of November 16th, lays out the ground rules, and I think they are clear.

It is difficult to pass upon each particular facet that may come up. You can only lay down general rules of procedure. The Master will have to take each individual matter as it comes up and determine each matter individually.

So I will, within the next week, dispose of this motion, and I will also appoint a successor to the Special Master, Mr. Rankin, who has notified me that he will no longer be able to preside as Special Master in this case.

*Transcript of Hearing Before Judge Metzner on
December 30, 1965*

Mr. Sonnett: Judge, I would like to again suggest and request that you consider taking the damage hearing yourself, if I may say just briefly, and I know it is getting close to lunch time, because I think we are going to be running back to you anyway repeatedly. I think that we are going to make haste very slowly. I think that the appearance before you today is a fair sample of what we are going to run into. I think that obviously you are going to have to review the entire record that is made before the Master, and of course you will, so that I think that the extent of that record and what ought to be in it and what ought not be in it, and the applications of your Honor's rulings, are things that you could dispose of much more readily than any master could, and we are going to have to educate a new master.

If you saw fit to do this, I would propose that we package our entire direct case and be prepared to submit it to you and to the defense—well, I am going into the hospital January 9th, and will be out for the balance of January, but we will be in a position to submit our case in writing, with narrative form evidence, and all the rest of it, by roughly, the third week in February or thereabouts.

I would hope that you would entertain the idea of our submitting that to you and to the defense, and then giving them a reasonable time to study it and prepare for cross, and then we would produce the witnesses before you for cross, which you could control, and we would get the thing done.

The case is now four years old. We have been up and down to the Court of Appeals and the Supreme Court. We are going, otherwise, to have to come back to you repeatedly.

The Court: I don't think you are going to have to come back repeatedly, Mr. Sonnett. Both you and Mr. Hayes are excellent and able lawyers, and I am sure that you are going to conduct yourselves as such.

*Transcript of Hearing Before Judge Metzner on
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I don't blame Mr. Hayes for making this motion. He is an advocate, and he thinks the best way to present his case is this way, and so he has done it.

I think when you get back to the Master, this is a classic case for the appointment of a special master, so I will appoint somebody who is capable, and I hope he is as capable as Mr. Rankin is and was in this case, and then we will proceed along the usual route.

Mr. Sonnett: Well, I am sorry that we can't do it before the Court directly because, while I agree it is a typical case for the appointment of a special master to assess damages, this case, as you will know, is far from being a typical case.

The Court: I know that, and this is not the reason I am doing it, but my calendar is jammed up. I go into the motion part on Monday, and you know what the motion part is in this court.

I have a Rule II antitrust case set for trial in May, and I have other assignments to dispose of, so I just can't reach you.

Mr. Hayes: May I make one suggestion, your Honor? Unless you, on reflection, decide to change your mind and see the wisdom of my approach, which I think is absolutely sound and which is not merely an advocate playing advocate and that is that you direct the Master, as his first order of business, to inquire as to whether or not Allegation 3 of the complaint can be found as a fact.

The Court: No, I won't circumscribe the Master that way, Mr. Hayes.

As I said, I am sure he is going to be a capable man who can handle the matter, and who is expert enough to handle it properly.

Happy New Year, gentlemen.

Mr. Sonnett: The same to you.

Mr. Hayes: And a Happy New Year to you, sir.

(Hearing concluded.)

**Opinion and Order of Judge Metzner Denying
Defendants' Motion for a Pre-Hearing Order,
dated January 4, 1966**

[Doc. 496]

[CAPTION]

61 Civ. 2324

METZNER, D. J.

Defendant has moved for a pre-hearing order calling upon the plaintiff to set forth the facts supported by the record or by matters judicially noticeable or by evidence which the plaintiff is prepared to offer, upon which plaintiff would rely to preclude the entry of the following finding of fact:

The facts before this Court establish that at no time during the period covered by the complaint herein were the defendants, or any of them, engaged in the manufacture or supply of commercial transport aircraft in competition with any manufacturer or supplier of such aircraft.

The defendant then requests that if this proposed finding of fact is supported notwithstanding the material set forth in the plaintiff's offer of proof, the finding of fact shall be made and the case dismissed as a matter of law.

A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion. After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in

*Opinion and Order of Judge Metzner
Denying Defendants' Motion for a
Pre-Hearing Order, dated January 4, 1966*

its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed.

Motion denied. So ordered.

Dated: New York, N. Y.
January 4, 1966

CHARLES M. METZNER /s
U. S. D. J

**Order of Judge Metzner of January 4, 1966
Designating Herbert Brownell as Special
Master in place of J. Lee Rankin**

[Doc. 497]

[CAPTION]

61 Civ. 2324

J. Lee Rankin, Esq., having requested permission to be relieved of his duties as Special Master in the above entitled matter, it is hereby

ORDERED that the order of this court dated May 3rd, 1963 is amended to the extent of designating Herbert Brownell, Esq., of 25 Broadway, New York, N. Y., as Special Master in place of said J. Lee Rankin.

**Dated: New York, N. Y.
January 4, 1966**

**CHARLES M. METZNER
U.S.D.J.**